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OF
DANIEL WEBSTER

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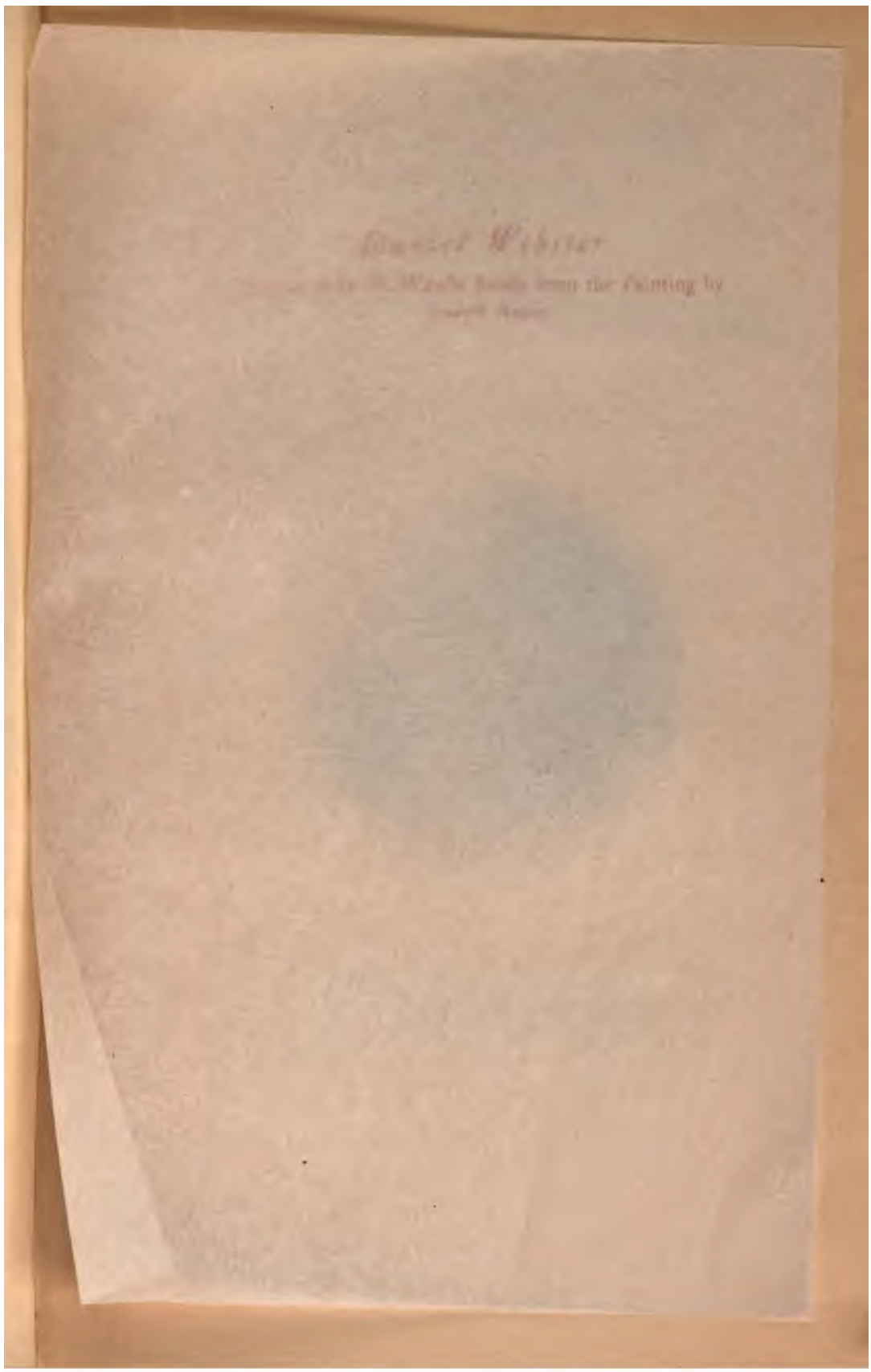
Daniel Webster

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IN EIGHTEEN VOLUMES

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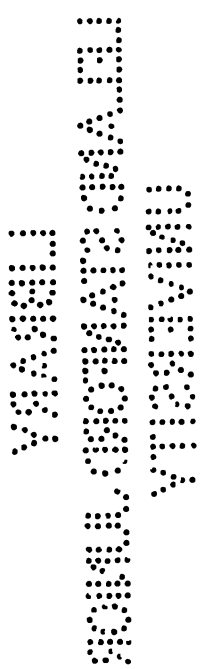

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DEDICATION[1]

WITH the warmest paternal affection, mingled with deeply afflicted feelings, I dedicate this, the last volume of my Works, to the memory of my deceased children:

JULIA WEBSTER APPLETON,

beloved in all the relations of Daughter, Wife, Mother, Sister, and Friend; and

MAJOR EDWARD WEBSTER,

who died in Mexico, in the military service of the United States, with unblemished honor and reputation, and who entered that service solely from a desire to be useful to his country and do honor to the State in which he was born.

"Go, gentle Spirits, to your destined rest:
While I, reversed our Nature's kindlier doom,
Pour forth a Father's sorrow on your tomb."

DANIEL WEBSTER.

[1] Volume VI, Edition of 1851.

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(CONTINUED)

The Case of Gibbons and Ogden

THIS was an appeal from the Court for the Trial of Impeachments and Correction of Errors of the State of New York. Aaron Ogden filed his bill in the Court of Chancery of that State, against Thomas Gibbons, setting forth the several acts of the legislature thereof, enacted for the purpose of securing to Robert R. Livingston and Robert Fulton the exclusive navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years which had not then expired; and authorizing the Chancellor to award an injunction, restraining any person whatever from navigating those waters with boats of that description. The bill stated an assignment from Livingston and Fulton to one John R. Livingston, and from him to the complainant, Ogden, of the right to navigate the waters between Elizabethtown, and other places in New Jersey, and the city of New York; and that Gibbons, the defendant below, was in possession of two steamboats, called the Stoudinger and the Bellona, which were actually employed in running between New York and Elizabethtown, in violation of the exclusive privilege conferred on the complainant, and praying an injunction to restrain the said Gibbons from using the said boats, or any other propelled by fire or steam, in navigating the waters within the territory of New York.

The injunction having been awarded, the answer of Gibbons was filed, in which he stated, that the boats employed by him were duly enrolled and licensed to be employed in carrying on the coasting trade, under the act of Congress, passed the 18th of February, 1793, ch. 8, entitled, "An Act for enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries, and for regulating the same." And the defendant insisted on his right, in virtue of such licenses, to navigate the waters between Elizabethtown and the city of New York, the said

* Argument made in the Case of Gibbons and Ogden, in the Supreme Court of the United States, February Term, 1824.

acts of the legislature of the State of New York to the contrary notwithstanding. At the hearing, the Chancellor perpetuated the injunction, being of the opinion that the said acts were not repugnant to the Constitution and laws of the United States, and were valid. This decree was affirmed in the Court for the Trial of Impeachments and Correction of Errors, which is the highest court of law and equity in the State of New York before which the cause could be carried, and it was thereupon carried up to the Supreme Court of the United States by appeal.

The following argument was made by Mr. Webster, for the plaintiff in error.

It is admitted, that there is a very respectable weight of authority in favor of the decision which is sought to be reversed. The laws in question, I am aware, have been deliberately reenacted by the legislature of New York; and they have also received the sanction, at different times, of all her judicial tribunals, than which there are few, if any, in the country, more justly entitled to respect and deference. The disposition of the court will be, undoubtedly, to support, if it can, laws so passed and so sanctioned. I admit, therefore, that it is justly expected of us that we should make out a clear case; and unless we do so, we cannot hope for a reversal. It should be remembered, however, that the whole of this branch of power, as exercised by this court, is a power of revision. The question must be decided by the State courts, and decided in a particular manner, before it can be brought here at all. Such decisions alone give this court jurisdiction; and therefore, while they are to be respected as the judgments of learned judges, they are yet in the condition of all decisions from which the law allows an appeal.

It will not be a waste of time to advert to the existing state of the facts connected with the subject of this litigation. The use of steamboats on the coasts and in the bays and rivers of the country, has become very general. The intercourse of its different parts essentially depends upon this mode of conveyance and transportation. Rivers and bays, in many cases, form the divisions between States; and thence it is obvious, that, if the States should make regulations for the navigation of these waters, and such regulations should be repugnant and hostile, embarrassment would necessarily be caused to the general intercourse of the community. Such events have actually occurred, and have created the existing state of things.

By the law of New York, no one can navigate the bay of New York, the North River, the Sound, the lakes, or any of the waters of that State, by steam-vessels, without a license from the grantees of New York, under penalty of forfeiture of the vessel.

By the law of the neighboring State of Connecticut, no one can enter her waters with a steam-vessel having such license.

By the law of New Jersey, if any citizen of that State shall be restrained, under the New York law, from using steamboats between the ancient shores of New Jersey and New York, he shall be entitled to an action for damages, in New Jersey, with treble costs against the party who thus restrains or impedes him under the law of New York! This act of New Jersey is called an act of retortion against the illegal and oppressive legislation of New York; and seems to be defended on those grounds of public law which justify reprisals between independent States.

It will hardly be contended, that all these acts are consistent with the laws and Constitution of the United States. If there is no power in the general government to control this extreme belligerent legislation of the States, the powers of the government are essentially deficient in a most important and interesting particular. The present controversy respects the earliest of these State laws, those of New York. On these, this court is now to pronounce; and if they should be declared to be valid and operative, I hope somebody will point out where the State right stops, and on what grounds the acts of other States are to be held inoperative and void.

It will be necessary to advert more particularly to the laws of New York, as they are stated in the record. The first was passed March 19th, 1787. By this act, a sole and exclusive right was granted to John Fitch, of making and using every kind of boat or vessel impelled by steam, in all creeks, rivers, bays, and waters within the territory and jurisdiction of New York, for fourteen years.

On the 27th of March, 1798, an act was passed, on the suggestion that Fitch was dead, or had withdrawn from the State, without having made any attempt to use his privilege, repealing the grant to him, and conferring similar privileges on Robert R. Livingston, for the term of twenty years, on a suggestion, made by him, that he was possessor of a mode of applying the steam-

engine to propel a boat, on new and advantageous principles. On the 5th of April, 1803, another act was passed, by which it was declared, that the rights and privileges granted to Robert R. Livingston by the last act should be extended to him and Robert Fulton, for twenty years from the passing of the act. Then there is the act of April 11, 1808, purporting to extend the monopoly, in point of time, five years for every additional boat, the whole duration, however, not to exceed thirty years; and forbidding any and all persons to navigate the waters of the State with any steam boat or vessel, without the license of Livingston and Fulton, under penalty of forfeiture of the boat or vessel. And lastly comes the act of April 9, 1811, for enforcing the provisions of the last-mentioned act, and declaring, that the forfeiture of the boat or vessel found navigating against the provisions of the previous acts shall be deemed to accrue on the day on which such boat or vessel should navigate the waters of the State; and that Livingston and Fulton might immediately have an action for such boat or vessel, in like manner as if they themselves had been dispossessed thereof by force; and that on bringing any such suit, the defendant therein should be prohibited, by injunction, from removing the boat or vessel out of the State, or using it within the State. There are one or two other acts mentioned in the pleadings, which principally respect the time allowed for complying with the condition of the grant, and are not material to the discussion of the case.

By these acts, then, an exclusive right is given to Livingston and Fulton to use steam navigation on all the waters of New York, for thirty years from 1808.

It is not necessary to recite the several conveyances and agreements, stated in the record, by which Ogden, the plaintiff below, derives title under Livingston and Fulton to the exclusive use of part of these waters for steam navigation.

The appellant being owner of a steamboat, and being found navigating the waters between New Jersey and the city of New York, over which waters Ogden, the plaintiff below, claims an exclusive right, under Livingston and Fulton, this bill was filed against him by Ogden, in October, 1818, and an injunction granted, restraining him from such use of his boat. This injunction was made perpetual, on the final hearing of the cause, in the Court of Chancery; and the decree of the Chancellor has

been duly affirmed in the Court of Errors. The right, therefore, which the plaintiff below asserts, to have and maintain his injunction, depends obviously on the general validity of the New York laws, and especially on their force and operation as against the right set up by the defendant. This right he states in his answer to be, that he is a citizen of New Jersey, and owner of the steamboat in question; that the boat is a vessel of more than twenty tons burden, duly enrolled and licensed for carrying on the coasting trade, and intended to be employed by him in that trade, between Elizabethtown, in New Jersey, and the city of New York; and that it was actually employed in navigating between those places at the time of, and until notice of, the injunction from the Court of Chancery was served on him.

On these pleadings the substantial question is raised, Are these laws such as the legislature of New York has a right to pass? If, so, do they, secondly, in their operation, interfere with any right enjoyed under the Constitution and laws of the United States, and are they therefore void, as far as such interference extends?

It may be well to state again their general purport and effect, and the purport and effect of the other State laws which have been enacted by way of retaliation.

A steam-vessel, of any description, going to New York, is forfeited to the representatives of Livingston and Fulton, unless she have their license. Going from New York or elsewhere to Connecticut, she is prohibited from entering the waters of that State if she have such license.

If the representatives of Livingston and Fulton in New York carry into effect, by judicial process, the provision of the New York laws, against any citizen of New Jersey, they expose themselves to a statute action in New Jersey for all damages, and treble costs.

The New York laws extend to all steam-vessels; to steam frigates, steam ferry-boats, and all intermediate classes. They extend to public as well as private ships; and to vessels employed in foreign commerce, as well as to those employed in the coasting trade.

The remedy is as summary as the grant itself is ample; for immediate confiscation, without seizure, trial, or judgment, is the penalty of infringement.

In regard to these acts, I shall contend, in the first place, that they exceed the power of the legislature; and, secondly, that, if they could be considered valid for any purpose, they are void still, as against any right enjoyed under the laws of the United States with which they come in collision; and that in this case they are found interfering with such rights.

I shall contend that the power of Congress to regulate commerce is complete and entire, and, to a certain extent, necessarily exclusive; that the acts in question are regulations of commerce, in a most important particular, affecting it in those respects in which it is under the exclusive authority of Congress. I state this first proposition guardedly. I do not mean to say, that all regulations which may, in their operation, affect commerce, are exclusively in the power of Congress; but that such power as has been exercised in this case does not remain with the States. Nothing is more complex than commerce; and in such an age as this, no words embrace a wider field than *commercial regulation*. Almost all the business and intercourse of life may be connected incidentally, more or less, with commercial regulations. But it is only necessary to apply to this part of the Constitution the well-settled rules of construction. Some powers are held to be exclusive in Congress, from the use of exclusive words in the grant; others, from the prohibitions on the States to exercise similar powers; and others, again, from the nature of the powers themselves. It has been by this mode of reasoning that the court has adjudicated many important questions; and the same mode is proper here. And, as some powers have been held to be exclusive, and others not so, under the same form of expression, from the nature of the different powers respectively; so where the power, on any one subject, is given in general words, like the power to regulate commerce, the true method of construction will be to consider of what parts the grant is composed, and which of those, from the nature of the thing, ought to be considered exclusive. The right set up in this case, under the laws of New York, is a monopoly. Now I think it very reasonable to say, that the Constitution never intended to leave with the States the power of granting monopolies either of trade or of navigation; and therefore, that as to this, the commercial power is exclusive in Congress.

It is in vain to look for a precise and exact *definition* of the powers of Congress on several subjects. The Constitution does not undertake the task of making such exact definitions. In conferring powers, it proceeds by the way of *enumeration*, stating the powers conferred, one after another, in few words; and where the power is general or complex in its nature, the extent of the grant must necessarily be judged of, and limited, by its object, and by the nature of the power.

Few things are better known than the immediate causes which led to the adoption of the present Constitution; and there is nothing, as I think, clearer, than that the prevailing motive was *to regulate commerce;* to rescue it from the embarrassing and destructive consequences resulting from the legislation of so many different States, and to place it under the protection of a uniform law. The great objects were commerce and revenue; and they were objects indissolubly connected. By the Confederation, divers restrictions had been imposed on the States; but these had not been found sufficient. No State, it is true, could send or receive an embassy; nor make any treaty; nor enter into any compact with another State, or with a foreign power; nor lay duties interfering with treaties which had been entered into by Congress. But all these were found to be far short of what the actual condition of the country required. The States could still, each for itself, regulate commerce, and the consequence was a perpetual jarring and hostility of commercial regulation.

In the history of the times, it is accordingly found, that the great topic, urged on all occasions, as showing the necessity of a new and different government, was the state of trade and commerce. To benefit and improve these was a great object in itself; and it became greater when it was regarded as the only means of enabling the country to pay the public debt, and to do justice to those who had most effectually labored for its independence. The leading state papers of the time are full of this topic. The New Jersey resolutions* complain that the regulation of trade was in the power of the several States, within their separate jurisdiction, to such a degree as to involve many difficulties and embarrassments; and they express an

* 1 Laws U. S. p. 28, Bioren and Duane's ed.

earnest opinion, that the sole and exclusive power of regulating trade with foreign states ought to be in Congress. Mr. Witherspoon's motion in Congress, in 1781, is of the same general character; and the report of a committee of that body, in 1785, is still more emphatic. It declares that Congress ought to possess the sole and exclusive power of regulating trade, as well with foreign nations as between the States.* The resolutions of Virginia, in January, 1786, which were the immediate cause of the Convention, put forth this same great object. Indeed, it is the only object stated in those resolutions. There is not another idea in the whole document. The sole purpose for which the delegates assembled at Annapolis was to devise means for the uniform regulation of trade. They found no means but in a general government; and they recommended a convention to accomplish that purpose. Over whatever other interests of the country this government may diffuse its benefits and its blessings, it will always be true, as matter of historical fact, that it had its immediate origin in the necessities of commerce; and for its immediate object, the relief of those necessities, by removing their causes, and by establishing a uniform and steady system. It will be easy to show, by reference to the discussions in the several State conventions, the prevalence of the same general topics; and if any one would look to the proceedings of several of the States, especially to those of Massachusetts and New York, he would see very plainly, by the recorded lists of votes, that wherever this commercial necessity was most strongly felt, there the proposed new Constitution had most friends. In the New York convention, the argument arising from this consideration was strongly pressed, by the distinguished person† whose name is connected with the present question.

We do not find, in the history of the formation and adoption of the Constitution, that any man speaks of a general concurrent power, in the regulation of foreign and domestic trade, as still residing in the States. The very object intended, more than any other, was to take away such power. If it had not so provided, the Constitution would not have been worth accepting.

* 1 Laws U. S., p. 50. † Chancellor Livingston.

I contend, therefore, that the people intended, in establishing the Constitution, to transfer from the several States to a general government those high and important powers over commerce, which, in their exercise, were to maintain a uniform and general system. From the very nature of the case, these powers must be exclusive; that is, the higher branches of commercial regulation must be exclusively committed to a single hand. What is it that is to be regulated? Not the commerce of the several States, respectively, but the commerce of the United States. Henceforth, the commerce of the States was to be a *unit;* and the system by which it was to exist and be governed must necessarily be complete, entire, and uniform. Its character was to be described in the flag which waved over it, E PLURIBUS UNUM. Now, how could individual States assert a right of concurrent legislation, in a case of this sort, without manifest encroachment and confusion? It should be repeated, that the words used in the Constitution, "to regulate commerce," are so very general and extensive, that they may be construed to cover a vast field of legislation, part of which has always been occupied by State laws; and therefore the words must have a reasonable construction, and the power should be considered as exclusively vested in Congress so far, and so far only, as the nature of the power requires. And I insist, that the nature of the case, and of the power, did imperiously require, that such important authority as that of granting monopolies of trade and navigation should not be considered as still retained by the States.

It is apparent, from the prohibitions on the power of the States, that the general concurrent power was not supposed to be left with them. And the exception out of these prohibitions of the inspection laws proves this still more clearly. Which most concerns the commerce of this country, that New York and Virginia should have an uncontrolled power to establish their inspection of flour and tobacco, or that they should have an uncontrolled power of granting either a monopoly of trade in their own ports, or a monopoly of navigation over all the waters leading to those ports? Yet the argument on the other side must be, that, although the Constitution has sedulously guarded and limited the first of these powers, it has left the last wholly unlimited and uncontrolled.

But although much has been said, in the discussion on former occasions, about this supposed concurrent power in the States, I find great difficulty in understanding what is meant by it. It is generally qualified by saying, that it is a power by which the States could pass laws on subjects of commercial regulation, which would be valid until Congress should pass other laws controlling them, or inconsistent with them, and that then the State laws must yield. What sort of concurrent powers are these, which cannot exist together? Indeed, the very reading of the clause in the Constitution must put to flight this notion of a general concurrent power. The Constitution was formed for all the States; and Congress was to have power to regulate commerce. Now, what is the import of this, but that Congress is to give the rule, to establish the system, to exercise the control over the subject? And can more than one power, in cases of this sort, give the rule, establish the system, or exercise the control? As it is not contended that the power of Congress is to be exercised by a supervision of State legislation, and as it is clear that Congress is to give the general rule, I contend that this power of giving the general rule is transferred, by the Constitution, from the States to Congress, to be exercised as that body may see fit; and consequently, that all those high exercises of power, which might be considered as giving the rule, or establishing the system, in regard to great commercial interests, are necessarily left with Congress alone. Of this character I consider monopolies of trade or navigation; embargoes; the system of navigation laws; the countervailing laws, as against foreign states; and other important enactments respecting our connection with such states. It appears to me a most reasonable construction to say, that in these respects the power of Congress is exclusive, from the nature of the power. If it be not so, where is the limit, or who shall fix a boundary for the exercise of the power of the States? Can a State grant a monopoly of trade? Can New York shut her ports to all but her own citizens? Can she refuse admission to ships of particular nations? The argument on the other side is, and must be, that she might do all these things, until Congress should revoke her enactments. And this is called *concurrent* legislation! What confusion such notions lead to is obvious enough. A power in the States to do any thing, and every thing, in regard to commerce,

till Congress shall undo it, would suppose a state of things at least as bad as that which existed before the present Constitution. It is the true wisdom of these governments to keep their action as distinct as possible. The general government should not seek to operate where the States can operate with more advantage to the community; nor should the States encroach on ground which the public good, as well as the Constitution, refers to the exclusive control of Congress.

If the present state of things, these laws of New York, the laws of Connecticut, and the laws of New Jersey, had been all presented, in the convention of New York, to the eminent person whose name is on this record, and who acted on that occasion so important a part; if he had been told, that, after all he had said in favor of the new government, and of its salutary effects on commercial regulations, the time would yet come when the North River would be shut up by a monopoly from New York, the Sound interdicted by a penal law of Connecticut, reprisals authorized by New Jersey against citizens of New York, and when one could not cross a ferry without transshipment, does any one suppose he would have admitted all this as compatible with the government which he was recommending?

This doctrine of a general concurrent power in the States is insidious and dangerous. If it be admitted, no one can say where it will stop. The States may legislate, it is said, wherever Congress has not made a plenary exercise of its power. But who is to judge whether Congress has made this plenary exercise of power? Congress has acted on this power; it has done all that it deemed wise; and are the States now to do whatever Congress has left undone? Congress makes such rules as, in its judgment, the case requires; and those rules, whatever they are, constitute the system.

All useful regulation does not consist in restraint; and that which Congress sees fit to leave free is a part of its regulation, as much as the rest.

The practice under the Constitution sufficiently evinces, that this portion of the commercial power is exclusive in Congress. When, before this instance, have the States granted monopolies? When, until now, have they interfered with the navigation of the country? The pilot laws, the health laws, or quar-

antine laws, and various regulations of that class, which have been recognized by Congress, are no arguments to prove, even if they are to be called commercial regulations (which they are not), that other regulations, more directly and strictly commercial, are not solely within the power of Congress. There is a singular fallacy, as I venture to think, in the argument of very learned and most respectable persons on this subject. That argument alleges, that the States have a concurrent power with Congress of regulating commerce; and the proof of this position is, that the States have, without any question of their right, passed acts respecting turnpike-roads, toll-bridges, and ferries. These are declared to be acts of commercial regulation, affecting not only the interior commerce of the State itself, but also commerce between different States. Therefore, as all these are commercial regulations, and are yet acknowledged to be rightfully established by the States, it follows, as is supposed, that the States must have a concurrent power to regulate commerce.

Now, what is the inevitable consequence of this mode of reasoning? Does it not admit the power of Congress, at once, upon all these minor objects of legislation? If all these be regulations of commerce, within the meaning of the Constitution, then certainly Congress, having a concurrent power to regulate commerce, may establish ferries, turnpike-roads, and bridges, and provide for all this detail of interior legislation. To sustain the interference of the State in a high concern of maritime commerce, the argument adopts a principle which acknowledges the right of Congress over a vast scope of internal legislation, which no one has heretofore supposed to be within its powers. But this is not all; for it is admitted that, when Congress and the States have power to legislate over the same subject, the power of Congress, when exercised, controls or extinguishes the State power; and therefore the consequence would seem to follow, from the argument, that all State legislation over such subjects as have been mentioned is, at all times, liable to the superior power of Congress; a consequence which no one would admit for a moment. The truth is, in my judgment, that all these things are, in their general character, rather regulations of police than of commerce, in the constitutional understanding of that term. A road, indeed, may be a matter of great commer-

cial concern. In many cases it is so; and when it is so, there is no doubt of the power of Congress to make it. But, generally speaking, roads, and bridges, and ferries, though of course they affect commerce and intercourse, do not possess such importance and elevation as to be deemed commercial regulations. A reasonable construction must be given to the Constitution; and such construction is as necessary to the just power of the States, as to the authority of Congress. Quarantine laws, for example, may be considered as affecting commerce; yet they are, in their nature, health laws. In England, we speak of the power of regulating commerce as in Parliament, or the king, as arbiter of commerce; yet the city of London enacts health laws. Would any one infer from that circumstance, that the city of London had concurrent power with Parliament or the crown to regulate commerce? or that it might grant a monopoly of the navigation of the Thames? While a health law is reasonable, it is a health law; but if, under color of it, enactments should be made for other purposes, such enactments might be void.

In the discussion in the New York courts, no small reliance was placed on the law of that State prohibiting the importation of slaves, as an example of a commercial regulation enacted by State authority. That law may or may not be constitutional and valid. It has been referred to generally, but its particular provisions have not been stated. When they are more clearly seen, its character may be better determined.

It might further be argued, that the power of Congress over these high branches of commerce is exclusive, from the consideration that Congress possesses an exclusive admiralty jurisdiction. That it does possess such exclusive jurisdiction will hardly be contested. No State pretends to exercise any jurisdiction of that kind. The States abolished their courts of admiralty, when the Constitution went into operation. Over these waters, therefore, or at least some of them, which are the subject of this monopoly, New York has no jurisdiction whatever. They are a part of the high seas, and not within the body of any county. The authorities of that State could not punish for a murder, committed on board one of these boats, in some places within the range of this exclusive grant. This restraining of the States from all jurisdiction out of the body

of their own counties, shows plainly enough that navigation on the high seas was understood to be a matter to be regulated only by Congress. It is not unreasonable to say, that what are called the waters of New York are, for purposes of navigation and commercial regulation, the waters of the United States. There is no cession, indeed, of the waters themselves, but their use for those purposes seems to be intrusted to the exclusive power of Congress. Several States have enacted laws which would appear to imply their conviction of the power of Congress over navigable waters to a greater extent.

If there be a concurrent power of regulating commerce on the high seas, there must be a concurrent admiralty jurisdiction, and a concurrent control of the waters. It is a common principle, that arms of the sea, including navigable rivers, belong to the sovereign, so far as navigation is concerned. Their use is navigation. The United States possess the general power over navigation, and, of course, ought to control, in general, the use of navigable waters. If it be admitted that, for purposes of trade and navigation, the North River and its bay are the river and bay of New York, and the Chesapeake the bay of Virginia, very great inconveniences and much confusion might be the result.

It may now be well to take a nearer view of these laws, to see more exactly what their provisions are, what consequences have followed from them, and what would and might follow from other similar laws.

The first grant to John Fitch gave him the sole and exclusive right of making, employing, and navigating all boats impelled by fire or steam, "in all creeks, rivers, bays, and waters within the territory and jurisdiction of the State." Any other person navigating such boat was to forfeit it, and to pay a penalty of a hundred pounds. The subsequent acts repeal this, and grant similar privileges to Livingston and Fulton; and the act of 1811 provides the extraordinary and summary remedy which has been already stated. The river, the bay, and the marine league along the shore, are all within the scope of this grant. Any vessel, therefore, of this description, coming into any of those waters, without a license, whether from another State or from abroad, whether it be a public or private vessel, is instantly forfeited to the grantees of the monopoly.

Now it must be remembered that this grant is made as an exercise of sovereign political power. It is not an inspection law, nor a health law, nor passed by any derivative authority; it is professedly an act of sovereign power. Of course, there is no limit to the power, to be derived from the purpose for which it is exercised. If exercised for one purpose, it may be also for another. No one can inquire into the motives which influence sovereign authority. It is enough that such power manifests its will. The motive alleged in this case is, to remunerate the grantees for a benefit conferred by them on the public. But there is no necessary connection between that benefit and this mode of rewarding it; and if the State could grant this monopoly for that purpose, it could also grant it for any other purpose. It could make the grant for money; and so make the monopoly of navigation over those waters a direct source of revenue. When this monopoly shall expire, in 1838, the State may continue it, for any pecuniary consideration which the holders may see fit to offer, and the State to receive.

If the State may grant this monopoly, it may also grant another, for other descriptions of vessels; for instance, for all sloops.

If it can grant these exclusive privileges to a few, it may grant them to many; that is, it may grant them to all its own citizens, to the exclusion of every body else.

But the waters of New York are no more the subject of exclusive grants by that State, than the waters of other States are subjects of such grants by those other States. Virginia may well exercise, over the entrance of the Chesapeake, all the power that New York can exercise over the bay of New York, and the waters on her shores. The Chesapeake, therefore, upon the principle of these laws, may be the subject of State monopoly; and so may the bay of Massachusetts. But this is not all. It requires no greater power to grant a monopoly of trade, than a monopoly of navigation. Of course, New York, if these acts can be maintained, may give an exclusive right of entry of vessels into her ports; and the other States may do the same. These are not extreme cases. We have only to suppose that other States should do what New York has already done, and that the power should be carried to its full extent.

To all this, no answer is to be given but one, that the concurrent power of the States, concurrent though it be, is yet subordinate to the legislation of Congress; and that therefore Congress may, whenever it pleases, annul the State legislation; but until it does so annul it, the State legislation is valid and effectual. What is there to recommend a construction which leads to a result like this? Here would be a perpetual hostility; one legislature enacting laws, till another legislature should repeal them; one sovereign power giving the rule, till another sovereign power should abrogate it; and all this under the idea of concurrent legislation!

But, further, under this concurrent power, the State does that which Congress cannot do; that is, it gives preferences to the citizens of some States over those of others. I do not mean here the advantages conferred by the grant on the grantees; but the disadvantages to which it subjects all the other citizens of New York. To impose an extraordinary tax on steam navigation visiting the ports of New York, and leaving it free everywhere else, is giving a preference to the citizens of other States over those of New York. This Congress could not do; and yet the State does it; so that this power, at first subordinate, then concurrent, now becomes paramount.

The people of New York have a right to be protected against this monopoly. It is one of the objects for which they agreed to this Constitution, that they should stand on an equality in commercial regulations; and if the government should not insure them that, the promises made to them in its behalf would not be performed.

I contend, therefore, in conclusion on this point, that the power of Congress over these high branches of commercial regulation is shown to be exclusive, by considering what was wished and intended to be done, when the convention for forming the Constitution was called; by what was understood, in the State conventions, to have been accomplished by the instrument; by the prohibitions on the States, and the express exception relative to inspection laws; by the nature of the power itself; by the terms used, as connected with the nature of the power; by the subsequent understanding and practice, both of Congress and the States; by the grant of exclusive admiralty jurisdiction to the federal government; by the manifest danger

of the opposite doctrine, and the ruinous consequences to which it directly leads.

Little is now required to be said, to prove that this exclusive grant is a law regulating commerce; although, in some of the discussions elsewhere, it has been called a law of police. If it be not a regulation of commerce, then it follows, against the constant admission on the other side, that Congress, even by an express act, cannot annul or control it. For if it be not a regulation of commerce, Congress has no concern with it. But the granting of monopolies of this kind is always referred to the power over commerce. It was as arbiter of commerce that the king formerly granted such monopolies.* This is a law regulating commerce, inasmuch as it imposes new conditions and terms on the coasting trade, on foreign trade generally, and on foreign trade as regulated by treaties; and inasmuch as it interferes with the free navigation of navigable waters.

If, then, the power of commercial regulation possessed by Congress be, in regard to the great branches of it, exclusive; and if this grant of New York be a commercial regulation, affecting commerce in respect to these great branches, then the grant is void, whether any case of actual collision has happened or not.

But I contend, in the second place, that whether the grant were to be regarded as wholly void or not, it must, at least, be inoperative, when the rights claimed under it come in collision with other rights, enjoyed and secured under the laws of the United States; and such collision, I maintain, clearly exists in this case. It will not be denied that the law of Congress is paramount. The Constitution has expressly provided for that. So that the only question in this part of the case is, whether the two rights be inconsistent with each other. The appellant has a right to go from New Jersey to New York, in a vessel owned by himself, of the proper legal description, and enrolled and licensed according to law. This right belongs to him as a citizen of the United States. It is derived under the laws of the United States, and no act of the legislature of New York can deprive him of it, any more than such act could deprive him of the right of holding lands in that State, or of suing

* 1 Black. Com. 273; 4 Black. Com. 160.

in its courts. It appears from the record, that the boat in question was regularly enrolled at Perth Amboy, and properly licensed for carrying on the coasting trade. Under this enrolment, and with this license, she was proceeding to New York, when she was stopped by the injunction of the Chancellor, on the application of the New York grantees. There can be no doubt that here is a collision, in fact; that which the appellant claimed as a right, the respondent resisted; and there remains nothing now but to determine whether the appellant had, as he contends, a right to navigate these waters; because, if he had such right, it must prevail.

Now, this right is expressly conferred by the laws of the United States. The first section of the act of February, 1793, ch. 8, regulating the coasting trade and fisheries, declares, that all ships and vessels, enrolled and licensed as that act provides, "and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade or fisheries." The fourth section of the same act declares, "that, in order to the licensing of any ship or vessel, for carrying on the coasting trade or fisheries," bond shall be given, according to the provisions of the act. And the same section declares, that, the owner having complied with the requisites of the law, "it shall be the duty of the collector to grant a license for carrying on the coasting trade"; and the act proceeds to give the form and words of the license, which is, therefore, of course, to be received as a part of the act; and the words of the license, after the necessary recitals, are, "License is hereby granted for the said vessel to be employed in carrying on the coasting trade." Words could not make this authority more express.

The court below seems to me, with great deference, to have mistaken the object and nature of the license. It seems to have been of opinion, that the license has no other intent or effect than to ascertain the ownership and character of the vessel. But this is the peculiar office and object of the enrolment. That document ascertains that the regular proof of ownership and character has been given; and the license is given to confer the right to which the party has shown himself entitled. It is the authority which the master carries with him, to prove his right to navigate freely the waters of the United States, and to carry on the coasting trade.

In some of the discussions which have been had on this question, it has been said, that Congress has only provided for ascertaining the ownership and property of vessels, but has not prescribed to what use they may be applied. But this is an obvious error. The whole object of the act regulating the coasting trade is to declare what vessels shall enjoy the benefit of being employed in that trade. To secure this use to certain vessels, and to deny it to others, is precisely the purpose for which the act was passed. The error, or what I humbly suppose to be the error, in the judgment of the court below, consists in that court's having thought, that, although Congress might act, it had not yet acted, in such a way as to confer a right on the appellant; whereas, if a right was not given by this law, it never could be given. No law can be more express. It has been admitted, that, supposing there is a provision in the act of Congress, that all vessels duly licensed shall be at liberty to navigate, for the purpose of trade and commerce, all the navigable harbors, bays, rivers, and lakes within the several States, any law of the States creating particular privileges as to any particular class of vessels to the contrary notwithstanding, the only question that could arise, in such a case, would be, whether the law was constitutional; and that, if that was to be granted or decided, it would certainly, in all courts and places, overrule and set aside the State grant.

Now, I do not see that such supposed case could be distinguished from the present. We show a provision in an act of Congress, that all vessels, duly licensed, may carry on the coasting trade; nobody doubts the constitutional validity of that law; and we show that this vessel was duly licensed according to its provisions. This is all that is essential in the case supposed. The presence or absence of a *non obstante* clause cannot affect the extent or operation of the act of Congress. Congress has no power of revoking State laws, as a distinct power. It legislates over subjects; and over those subjects which are within its power, its legislation is supreme, and necessarily overrules all inconsistent or repugnant State legislation. If Congress were to pass an act expressly revoking or annulling, in whole or in part, this New York grant, such an act would be wholly useless and inoperative. If the New York grant be opposed to, or inconsistent with, any constitutional power which

Congress has exercised, then, so far as the incompatibility exists, the grant is nugatory and void, necessarily, and by reason of the supremacy of the law of Congress. But if the grant be not inconsistent with any exercise of the powers of Congress, then, certainly, Congress has no authority to revoke or annul it. Such an act of Congress, therefore, would be either unconstitutional or supererogatory. The laws of Congress need no *non obstante* clause. The Constitution makes them supreme, when State laws come into opposition to them. So that in these cases there is no question except this; whether there be, or be not, a repugnancy or hostility between the law of Congress and the law of the State. Nor is it at all material, in this view, whether the law of the State be a law regulating commerce, or a law of police, nor by what other name or character it may be designated. If its provisions be inconsistent with an act of Congress, they are void, so far as that inconsistency extends. The whole argument, therefore, is substantially and effectually given up, when it is admitted that Congress might, by express terms, abrogate the State grant, or declare that it should not stand in the way of its own legislation; because such express terms would add nothing to the effect and operation of an act of Congress.

I contend, therefore, upon the whole of this point, that a case of actual collision has been made out between the State grant and the act of Congress; and as the act of Congress is entirely unexceptionable, and clearly in pursuance of its constitutional powers, the State grant must yield.

There are other provisions of the Constitution of the United States, which have more or less bearing on this question. "No State shall, without the consent of Congress, lay any duty of tonnage." Under color of grants like this, that prohibition might be wholly evaded. This grant authorizes Messrs. Livingston and Fulton to license navigation in the waters of New York. They, of course, license it on their own terms. They may require a pecuniary consideration, ascertained by the tonnage of the vessel, or in any other manner. Probably, in fact, they govern themselves, in this respect, by the size or tonnage of the vessels to which they grant licenses. Now, what is this but substantially a tonnage duty, under the law of the State? Or

does it make any difference, whether the receipts go directly into her own treasury, or into the hands of those to whom she has made the grant?

There is, lastly, that provision of the Constitution which gives Congress power to promote the progress of science and the useful arts, by securing to authors and inventors, for a limited time, an exclusive right to their own writings and discoveries. Congress has exercised this power, and made all the provisions which it deemed useful or necessary. The States may, indeed, like munificent individuals, exercise their own bounty towards authors and inventors, at their own discretion. But to confer reward by exclusive grants, even if it were but a part of the use of the writing or invention, is not supposed to be a power properly to be exercised by the States. Much less can they, under the notion of conferring rewards in such cases, grant monopolies, the enjoyment of which is essentially incompatible with the exercise of rights possessed under the laws of the United States. I shall insist, however, the less on these points, as they are open to counsel who will come after me on the same side, and as I have said so much upon what appears to me the more important and interesting part of the argument.

The Case of Ogden and Saunders*

THIS was an action of *assumpsit*, brought originally in the Circuit Court of Louisiana, by Saunders, a citizen of Kentucky, against Ogden, a citizen of Louisiana. The plaintiff below declared upon certain bills of exchange, drawn on the 30th of September, 1806, by one Jordan, at Lexington, in the State of Kentucky, upon the defendant below, Ogden, in the city of New York, (the defendant then being a citizen and resident of the State of New York,) accepted by him at the city of New York, and protested for non-payment.

The defendant below pleaded several pleas, among which was a certificate of discharge under the act of the legislature of the State of New York, of April 3d, 1801, for the relief of insolvent debtors, commonly called the Three-Fourths Act.

The jury found the facts in the form of a special verdict, on which the court rendered a judgment for the plaintiff below, and the cause was brought by writ of error before this court. The question which arose under this plea, as to the validity of the law of New York as being repugnant to the Constitution of the United States, was argued at February term, 1824, by Mr. Clay, Mr. D. B. Ogden, and Mr. Haines, for the plaintiff in error, and by Mr. Webster and Mr. Wheaton, for the defendant in error, and the cause was continued for advisement until the present term. It was again argued at the present term, by Mr. Webster and Mr. Wheaton, against the validity, and by the Attorney-General, Mr. E. Livingston, Mr. D. B. Ogden, Mr. Jones, and Mr. Sampson, for the validity.

Mr. Wheaton opened the argument for the defendant in error; he was followed by the counsel for the plaintiff in error; and Mr. Webster replied as follows.

* An Argument made in the Case of Ogden and Saunders, in the Supreme Court of the United States, January Term, 1827.

THE question arising in this case is not more important, nor so important even, in its bearing on individual cases of private right, as in its character of a public political question. The Constitution was intended to accomplish a great political object. Its design was not so much to prevent injustice or injury in one case, or in successive single cases, as it was to make general salutary provisions, which, in their operation, should give security to all contracts, stability to credit, uniformity among all the States in those things which materially concern the foreign commerce of the country, and their own credit, trade, and intercourse with each other. The real question is, therefore, a much broader one than has been argued. It is this: Whether the Constitution has not, for general political purposes, ordained that bankrupt laws should be established only by national authority? We contend that such was the intention of the Constitution; an intention, as we think, plainly manifested in several of its provisions.

The act of New York, under which this question arises, provides that a debtor may be discharged from all his debts, upon assigning his property to trustees for the use of his creditors. When applied to the discharge of debts contracted before the date of the law, this court has decided that the act is invalid.* The act itself makes no distinction between past and future debts, but provides for the discharge of both in the same manner. In the case, then, of a debt already existing, it is admitted that the act does impair the obligation of contracts. We wish the full extent of this decision to be well considered. It is not merely that the legislature of the State cannot interfere by law, in the particular case of A or B, to injure or impair rights which have become vested under contracts; but it is, that they have no power by general law to regulate the manner in which all debtors may be discharged from subsisting contracts; in other words, they cannot pass general bankrupt laws to be applied *in presenti*. Now, it is not contended that such laws are unjust, and ought not to be passed by any legislature. It is not said that they are unwise or impolitic. On the contrary, we know the general practice to be, that, when bankrupt laws are established, they make no distinction between present and

* Sturges *v.* Crowninshield, 4 Wheat. Rep 122.

future debts. While all agree that special acts, made for individual cases, are unjust, all admit that a general law, made for all cases, may be both just and politic. The question, then, which meets us on the threshold is this: If the Constitution meant to leave the States the power of establishing systems of bankruptcy to act upon future debts, what great or important object of a political nature is answered by denying the power of making such systems applicable to existing debts?

The argument used in Sturges *v.* Crowninshield was, at least, a plausible and consistent argument. It maintained that the prohibition of the Constitution was levelled only against interferences in individual cases, and did not apply to general laws, whether those laws were retrospective or prospective in their operation. But the court rejected that conclusion. It decided that the Constitution was intended to apply to general laws or systems of bankruptcy; that an act providing that all debtors might be discharged from all creditors, upon certain conditions, was of no more validity than an act providing that a particular debtor, A, should be discharged on the same conditions from his particular creditor, B.

It being thus decided that general laws are within the prohibition of the Constitution, it is for the plaintiff in error now to show on what ground, consistent with the general objects of the Constitution, he can establish a distinction which can give effect to those general laws in their application to future debts, while it denies them effect in their application to subsisting debts. The words are, that "no State shall pass any law impairing the obligation of contracts." The general operation of all such laws is to impair that obligation; that is, to discharge the obligation without fulfilling it. This is admitted; and the only ground taken for the distinction to stand on is, that, when the law was in existence at the time of the making of the contract, the parties must be supposed to have reference to it, or, as it is usually expressed, the law is made a part of the contract. Before considering what foundation there is for this argument, it may be well to inquire what is that obligation of contracts of which the Constitution speaks, and whence is it derived.

The definition given by the court in Sturges *v.* Crowninshield is sufficient for our present purpose. "A contract," say the

court, "is an agreement to do some particular thing; the law binds the party to perform this agreement, and this is the obligation of the contract."

It is indeed probable that the Constitution used the words in a somewhat more popular sense. We speak, for example, familiarly of a usurious contract, and yet we say, speaking technically, that a usurious agreement is no contract.

By the obligation of a contract, we should understand the Constitution to mean, the duty of performing a legal agreement. If the contract be lawful, the party is bound to perform it. But bound by what? What is it that binds him? And this leads us to what we regard as a principal fallacy in the argument on the other side. That argument supposes, and insists, that the whole obligation of a contract has its origin in the municipal law. This position we controvert. We do not say that it is that obligation which springs from conscience merely; but we deny that it is only such as springs from the particular law of the place where the contract is made. It must be a lawful contract, doubtless; that is, permitted and allowed; because society has a right to prohibit all such contracts, as well as all such actions, as it deems to be mischievous or injurious. But if the contract be such as the law of society tolerates, in other words, if it be lawful, then we say, the duty of performing it springs from universal law. And this is the concurrent sense of all the writers of authority.

The duty of performing promises is thus shown to rest on universal law; and if, departing from this well-established principle, we now follow the teachers who instruct us that the obligation of a contract has its origin in the law of a particular State, and is in all cases what that law makes it, and no more, and no less, we shall probably find ourselves involved in inextricable difficulties. A man promises, for a valuable consideration, to pay money in New York. Is the obligation of that contract created by the laws of that State, or does it subsist independent of those laws? We contend that the obligation of a contract, that is, the duty of performing it, is not created by the law of the particular place where it is made, and dependent on that law for its existence; but that it may subsist, and does subsist, without that law, and independent of it. The obligation is in the contract itself, in the assent of the parties,

and in the sanction of universal law. This is the doctrine of Grotius, Vattel, Burlamaqui, Pothier, and Rutherforth. The contract, doubtless, is necessarily to be enforced by the municipal law of the place where performance is demanded. The municipal law acts on the contract after it is made, to compel its execution, or give damages for its violation. But this is a very different thing from the same law being the origin or fountain of the contract.

Let us illustrate this matter by an example. Two persons contract together in New York for the delivery, by one to the other, of a domestic animal, a utensil of husbandry, or a weapon of war. This is a lawful contract, and, while the parties remain in New York, it is to be enforced by the laws of that State. But if they remove with the article to Pennsylvania or Maryland, there a new law comes to act upon the contract, and to apply other remedies if it be broken. Thus far the remedies are furnished by the laws of society. But suppose the same parties to go together to a savage wilderness, or a desert island, beyond the reach of the laws of any society. The obligation of the contract still subsists, and is as perfect as ever, and is now to be enforced by another law, that is, the law of nature; and the party to whom the promise was made has a right to take by force the animal, the utensil, or the weapon that was promised him. The right is as perfect here as it was in Pennsylvania, or even in New York; but this could not be so if the obligation were created by the law of New York, or were dependent on that law for its existence, because the laws of that State can have no operation beyond its territory. Let us reverse this example. Suppose a contract to be made between two persons cast ashore on an uninhabited territory, or in a place over which no law of society extends. There are such places, and contracts have been made by individuals casually there, and these contracts have been enforced in courts of law in civilized communities. Whence do such contracts derive their obligation, if not from universal law?

If these considerations show us that the obligation of a lawful contract does not derive its force from the particular law of the place where made, but may exist where that law does not exist, and be enforced where that law has no validity, then it follows, we contend, that any statute which diminishes or

lessens its obligation does impair it, whether it precedes or succeeds the contract in date. The contract having an independent origin, whenever the law comes to exist together with it, and interferes with it, it lessens, we say, and impairs, its own original and independent obligation. In the case before the court, the contract did not owe its existence to the particular law of New York; it did not depend on that law, but could be enforced without the territory of that State, as well as within it. Nevertheless, though legal, though thus independently existing, though thus binding the party everywhere, and capable of being enforced everywhere, yet the statute of New York says that it shall be discharged without payment. This, we say, impairs the obligation of that contract. It is admitted to have been legal in its inception, legal in its full extent, and capable of being enforced by other tribunals according to its terms. An act, then, purporting to discharge it without payment, is, as we contend, an act impairing its obligation.

Here, however, we meet the opposite argument, stated on different occasions in different terms, but usually summed up in this, that the law itself is a part of the contract, and therefore cannot impair it. What does this mean? Let us seek for clear ideas. It does not mean that the law gives any particular construction to the terms of the contract, or that it makes the promise, or the consideration, or the time of performance, other than is expressed in the instrument itself. It can only mean, that it is to be taken as a part of the contract, or understanding of the parties, that the contract itself shall be enforced by such laws and regulations, respecting remedy and for the enforcement of contracts, as are in being in the State where it is made at the time of entering into it. This is meant, or nothing very clearly intelligible is meant, by saying the law is part of the contract.

There is no authority in adjudged cases for the plaintiff in error but the State decisions which have been cited, and, as has already been stated, they all rest on this reason, that the law is part of the contract.

Against this we contend, —

1st. That, if the proposition were true, the consequence would not follow.

2d. That the proposition itself cannot be maintained.

1. If it were true that the law is to be considered as part of the contract, the consequence contended for would not follow; because, if this statute be part of the contract, so is every other legal or constitutional provision existing at the time which affects the contract, or which is capable of affecting it; and especially this very article of the Constitution of the United States is part of the contract. The plaintiff in error argues in a complete circle. He supposes the parties to have had reference to it because it was a binding law, and yet he proves it to be a binding law only upon the ground that such reference was made to it. We come before the court alleging the law to be void, as unconstitutional; they stop the inquiry by opposing to us the law itself. Is this logical? Is it not precisely *objectio ejus, cujus dissolutio petitur?* If one bring a bill to set aside a judgment, is that judgment itself a good plea in bar to the bill? We propose to inquire if this law is of force to control our contract, or whether, by the Constitution of the United States, such force be not denied to it. The plaintiff in error stops us by saying that it does control the contract, and so arrives shortly at the end of the debate. Is it not obvious, that, supposing the act of New York to be a part of the contract, the question still remains as undecided as ever. What is that act? Is it a law, or is it a nullity? a thing of force, or a thing of no force? Suppose the parties to have contemplated this act, what did they contemplate? its words only, or its legal effect? its words, or the force which the Constitution of the United States allows to it? If the parties contemplated any law, they contemplated all the law that bore on their contract, the aggregate of all the statute and constitutional provisions. To suppose that they had in view one statute without regarding others, or that they contemplated a statute without considering that paramount constitutional provisions might control or qualify that statute, or abrogate it altogether, is unreasonable and inadmissible. "This contract," says one of the authorities relied on, "is to be construed as if the law were specially recited in it." Let it be so for the sake of argument. But it is also to be construed as if the prohibitory clause of the Constitution were recited in it, and this brings us back again to the precise point from which we departed.

The Constitution always accompanies the law, and the latter

can have no force which the former does not allow to it. If the reasoning were thrown into the form of special pleading, it would stand thus: the plaintiff declares on his debt; the defendant pleads his discharge under the law; the plaintiff alleges the law unconstitutional; but the defendant says, You knew of its existence; to which the answer is obvious and irresistible, I knew its existence on the statute-book of New York, but I knew, at the same time, it was null and void under the Constitution of the United States.

The language of another leading decision is, "A law in force at the time of making the contract does not violate that contract"; but the very question is, whether there be any such law "in force"; for if the States have no authority to pass such laws, then no such law can be in force. The Constitution is a part of the contract as much as the law, and was as much in the contemplation of the parties. So that the proposition, if it be admitted that the law is part of the contract, leaves us just where it found us; that is to say, under the necessity of comparing the law with the Constitution, and of deciding by such comparison whether it be valid or invalid. If the law be unconstitutional, it is void, and no party can be supposed to have had reference to a void law. If it be constitutional, no reference to it need be supposed.

2. But the proposition itself cannot be maintained. The law is no part of the contract. What part is it? the promise? the consideration? the condition? Clearly, it is neither of these. It is no term of the contract. It acts upon the contract only when it is broken, or to discharge the party from its obligation after it is broken. The municipal law is the force of society employed to compel the performance of contracts. In every judgment in a suit on contract, the damages are given, and the imprisonment of the person or sale of goods awarded, not in performance of the contract, or as part of the contract, but as an indemnity for the breach of the contract. Even interest, which is a strong case, where it is not expressed in the contract itself, can only be given as damages. It is all but absurd to say that a man's goods are sold on a *fieri facias*, or that he himself goes to jail, in pursuance of his contract. These are the penalties which the law inflicts for the breach of his contract. Doubtless, parties, when they enter into contracts, may well consider

both what their rights and what their liabilities will be by the law, if such contracts be broken; but this contemplation of consequences which can ensue only when the contract is broken, is no part of the contract itself. The law has nothing to do with the contract till it be broken; how, then, can it be said to form a part of the contract itself?

But there are other cogent and more specific reasons against considering the law as part of the contract. (1.) If the law be part of the contract, it cannot be repealed or altered; because, in such case, the repealing or modifying law itself would impair the obligation of the contract. The insolvent law of New York, for example, authorizes the discharge of a debtor on the consent of two thirds of his creditors. A subsequent act requires the consent of three fourths; but if the existing law be part of the contract, this latter law would be void. In short, nothing which is part of the contract can be varied but by consent of the parties; therefore the argument runs *in absurdum;* for it proves that no laws for enforcing the contract, or giving remedies upon it, or any way affecting it, can be changed or modified between its creation and its end. If the law in question binds one party on the ground of assent to it, it binds both, and binds them until they agree to terminate its operation. (2.) If the party be bound by an implied assent to the law, as thereby making the law a part of the contract, how would it be if the parties had expressly dissented, and agreed that the law should make no part of the contract? Suppose the promise to have been, that that the promiser would pay at all events, and not take advantage of the statute; still, would not the statute operate on the whole; on this particular agreement and all? and does not this show that the law is no part of the contract, but something above it? (3.) If the law of the place be part of the contract, one of its terms and conditions, how could it be enforced, as we all know it might be, in another jurisdiction, which should have no regard to the law of the place? Suppose the parties, after the contract, to remove to another State, do they carry the law with them as part of their contract? We all know they do not. Or take a common case. Some States have laws abolishing imprisonment for debt; these laws, according to the argument, are all parts of the contract; how, then, can the party, when sued in another State, be imprisoned contrary to the terms of his con-

tract? (4.) The argument proves too much, inasmuch as it applies as strongly to prior as to subsequent contracts. It is founded on a supposed assent to the exercise of legislative authority, without considering whether that exercise be legal or illegal. But it is equally fair to found the argument on an implied assent to the potential exercise of that authority. The implied reference to the control of legislative power is as reasonable and as strong when that power is dormant, as while it is in exercise. In one case, the argument is, "The law existed, you knew it, and acquiesced." In the other it is, "The power to pass the law existed, you knew it, and took your chance." There is as clear an assent in one instance as in the other. Indeed, it is more reasonable and more sensible to imply a general assent to all the laws of society, present and to come, from the fact of living in it, than it is to imply a particular assent to a particular existing enactment. The true view of the matter is, that every man is presumed to submit to all power which may be lawfully exercised over him or his right, and no one should be presumed to submit to illegal acts of power, whether actual or contingent. (5.) But a main objection to this argument is, that it would render the whole constitutional provision idle and inoperative; and no explanatory words, if such words had been added in the Constitution, could have prevented this consequence. The law, it is said, is part of the contract; it cannot, therefore, impair the contract, because a contract cannot impair itself. Now, if this argument be sound, the case would have been the same, whatever words the Constitution had used. If, for example, it had declared that no State should pass any law impairing contracts *prospectively* or *retrospectively;* or any law impairing contracts, whether existing or future; or, whatever terms it had used to prohibit precisely such a law as is now before the court, the prohibition would be totally nugatory if the law is to be taken as part of the contract; and the result would be, that, whatever may be the laws which the States by this clause of the Constitution are prohibited from passing, yet, if they in fact do pass such laws, those laws are valid, and bind parties by a supposed assent.

But further, this idea, if well founded, would enable the States to defeat the whole constitutional provision by a general enactment. Suppose a State should declare, by law, that all

contracts entered into therein should be subject to such laws as the legislature, at any time, or from time to time, might see fit to pass. This law, according to the argument, would enter into the contract, become a part of it, and authorize the interference of the legislative power with it, for any and all purposes, wholly uncontrolled by the Constitution of the United States.

So much for the argument that the law is a part of the contract. We think it is shown to be not so; and if it were, the expected consequence would not follow.

The inquiry, then, recurs, whether the law in question be such a law as the legislature of New York had authority to pass. The question is general. We differ from our learned adversaries on general principles. We differ as to the main scope and end of this constitutional provision. They think it entirely remedial; we regard it as preventive. They think it adopted to secure redress for violated private rights; to us, it seems intended to guard against great public mischiefs. They argue it as if it were designed as an indemnity or protection for injured private rights, in individual cases of *meum* and *tuum;* we look upon it as a great political provision, favorable to the commerce and credit of the whole country. Certainly we do not deny its application to cases of violated private right. Such cases are clearly and unquestionably within its operation. Still, we think its main scope to be general and political. And this, we think, is proved by reference to the history of the country, and to the great objects which were sought to be attained by the establishment of the present government. Commerce, credit, and confidence were the principal things which did not exist under the old Confederation, and which it was a main object of the present Constitution to create and establish. A vicious system of legislation, a system of paper money and tender laws, had completely paralyzed industry, threatened to beggar every man of property, and ultimately to ruin the country. The relation between debtor and creditor, always delicate, and always dangerous whenever it divides society, and draws out the respective parties into different ranks and classes, was in such a condition in the years 1787, 1788, and 1789, as to threaten the overthrow of all government; and a revolution was menaced, much more critical and alarming than that through which the country had

recently passed. The object of the new Constitution was to arrest these evils; to awaken industry by giving security to property; to establish confidence, credit, and commerce, by salutary laws, to be enforced by the power of the whole community. The Revolutionary War was over, the country had peace, but little domestic tranquillity; it had liberty, but few of its enjoyments, and none of its security. The States had struggled together, but their union was imperfect. They had freedom, but not an established course of justice. The Constitution was therefore framed, as it professes, "to form a more perfect union, to establish justice, to secure the blessings of liberty, and to insure domestic tranquillity."

It is not pertinent to this occasion to advert to all the means by which these desirable ends were to be obtained. Some of them, closely connected with the subject now under consideration, are obvious and prominent. The objects were commerce, credit, and mutual confidence in matters of property; and these required, among other things, a uniform standard of value or medium of payments. One of the first powers given to Congress, therefore, is that of coining money and fixing the value of foreign coins; and one of the first restraints imposed on the States is the total prohibition to coin money. These two provisions are industriously followed up and completed by denying to the States all power to emit bills of credit, or to make any thing but gold and silver a tender in the payment of debts. The whole control, therefore, over the standard of value and medium of payments is vested in the general government. And here the question instantly suggests itself, Why should such pains be taken to confide to Congress alone this exclusive power of fixing on a standard of value, and of prescribing the medium in which debts shall be paid, if it is, after all, to be left to every State to declare that debts may be discharged, and to prescribe how they may be discharged, without any payment at all? Why say that no man shall be obliged to take, in discharge of a debt, paper money issued by the authority of a State, and yet say, that by the same authority the debt may be discharged without any payment whatever?

We contend, that the Constitution has not left its work thus unfinished. We contend, that, taking its provisions together, it is apparent it was intended to provide for two things, intimately connected with each other. These are,—

1. A medium for the payment of debts; and
2. A uniform manner of discharging debts, when they are to be discharged without payment.

The arrangement of the grants and prohibitions contained in the Constitution is fit to be regarded on this occasion. The grant to Congress and the prohibition on the States, though they are certainly to be construed together, are not contained in the same clauses. The powers granted to Congress are enumerated one after another in the eighth section; the principal limitations on those powers, in the ninth section; and the prohibitions to the States, in the tenth section. Now, in order to understand whether any particular power be exclusively vested in Congress, it is necessary to read the terms of the grant, together with the terms of the prohibition. Take an example from that power of which we have been speaking, the coinage power. Here the grant to Congress is, "To coin money, regulate the value thereof, and of foreign coins." Now, the correlative prohibition on the States, though found in another section, is undoubtedly to be taken in immediate connection with the foregoing, as much as if it had been found in the same clause. The only just reading of these provisions, therefore, is this: "Congress shall have power to coin money, regulate the value thereof, and of foreign coin; but no State shall coin money, emit bills of credit, or make any thing but gold and silver coin a tender in payment of debts."

These provisions respect the medium of payment, or standard of value, and, thus collated, their joint result is clear and decisive. We think the result clear, also, of those provisions which respect the discharge of debts without payment. Collated in like manner, they stand thus: "Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States; but no State shall pass any law impairing the obligation of contracts." This collocation cannot be objected to, if they refer to the same subject-matter; and that they do refer to the same subject-matter we have the authority of this court for saying, because this court solemnly determined, in Sturges *v.* Crowninshield, that this prohibition on the States did apply to systems of bankruptcy. It must be now taken, therefore, that State bankrupt laws were in the mind of the convention when the prohibition was adopted, and

therefore the grant to Congress on the subject of bankrupt laws, and the prohibition to the States on the same subject, are properly to be taken and read together; and being thus read together, is not the intention clear to take away from the States the power of passing bankrupt laws, since, while enacted by them, such laws would not be uniform, and to confer the power exclusively on Congress, by whom uniform laws could be established?

Suppose the order of arrangement in the Constitution had been otherwise than it is, and that the prohibitions to the States had preceded the grants of power to Congress, the two powers, when collated, would then have read thus: "No State shall pass any law impairing the obligation of contracts; but Congress may establish uniform laws on the subject of bankruptcies." Could any man have doubted, in that case, that the meaning was, that the States should not pass laws discharging debts without payment, but that Congress might establish uniform bankrupt acts? And yet this inversion of the order of the clauses does not alter their sense. We contend, that Congress alone possesses the power of establishing bankrupt laws; and although we are aware that, in Sturges *v.* Crowninshield, the court decided that such an exclusive power could not be inferred from the words of the grant in the seventh section, we yet would respectfully request the bench to reconsider this point. We think it could not have been intended that both the States and general government should exercise this power; and therefore, that a grant to one implies a prohibition on the other. But not to press a topic which the court has already had under its consideration, we contend, that, even without reading the clauses of the Constitution in the connection which we have suggested, and which is believed to be the true one, the prohibition in the tenth section, taken by itself, does forbid the enactment of State bankrupt laws, as applied to future as well as present debts. We argue this from the words of the prohibition, from the association they are found in, and from the objects intended.

1. The words are general. The States can pass no law impairing contracts; that is, any contract. In the nature of things a law may impair a future contract, and therefore such contract is within the protection of the Constitution. The

words being general, it is for the other side to show a limitation; and this, it is submitted, they have wholly failed to do, unless they shall have established the doctrine that the law itself is part of the contract. It may be added, that the particular expression of the Constitution is worth regarding. The thing prohibited is called a *law*, not an *act*. A law, in its general acceptation, is a rule prescribed for future conduct, not a legislative interference with existing rights. The framers of the Constitution would hardly have given the appellation of *law* to violent invasions of individual right, or individual property, by acts of legislative power. Although, doubtless, such acts fall within this prohibition, yet they are prohibited also by general principles, and by the constitutions of the States, and therefore further provision against such acts was not so necessary as against other mischiefs.

2. The most conclusive argument, perhaps, arises from the connection in which the clause stands. The words of the prohibition, so far as it applies to civil rights, or rights of property, are, that "no State shall coin money, emit bills of credit, make any thing but gold and silver coin a tender in the payment of debts, or pass any law impairing the obligation of contracts." The prohibition of attainders, and *ex post facto* laws, refers entirely to criminal proceedings, and therefore should be considered as standing by itself; but the other parts of the prohibition are connected by the subject-matter, and ought, therefore, to be construed together. Taking the words thus together, according to their natural connection, how is it possible to give a more limited construction to the term "contracts," in the last branch of the sentence, than to the word "debts," in that immediately preceding? Can a State make any thing but gold and silver a tender in payment of future debts? This nobody pretends. But what ground is there for a distinction? No State shall make any thing but gold and silver a tender in the payment of debts, nor pass any law impairing the obligation of contracts. Now, by what reasoning is it made out that the debts here spoken of are any debts, either existing or future, but that the contracts spoken of are subsisting contracts only? Such a distinction seems to us wholly arbitrary. We see no ground for it. Suppose the article, where it uses the word *debts*, had used the word *contracts*. The sense would have been the

same then that it now is; but the identity of terms would have made the nature of the distinction now contended for somewhat more obvious. Thus altered, the clause would read, that no State should make any thing but gold and silver a tender in discharge of *contracts*, nor pass any law impairing the obligation of *contracts;* yet the first of these expressions would have been held to apply to all contracts, and the last to subsisting contracts only. This shows the consequence of what is now contended for in a strong light. It is certain that the substitution of the word *contracts* for *debts* would not alter the sense; and an argument that could not be sustained, if such substitution were made, cannot be sustained now. We maintain, therefore, that, if tender laws may not be made for future debts, neither can bankrupt laws be made for future contracts. All the arguments used here may be applied with equal force to tender laws for future debts. It may be said, for instance, that, when it speaks of *debts*, the Constitution means existing debts, and not mere possibilities of future debt; that the object was to preserve vested rights; and that if a man, after a tender law had passed, had contracted a debt, the manner in which that tender law authorized that debt to be discharged became part of the contract, and that the whole debt, or whole obligation, was thus qualified by the preëxisting law, and was no more than a contract to deliver so much paper money, or whatever other article might be made a tender, as the original bargain expressed. Arguments of this sort will not be found wanting in favor of tender laws, if the court yield to similar arguments in favor of bankrupt laws.

These several prohibitions of the Constitution stand in the same paragraph; they have the same purpose, and were introduced for the same object; they are expressed in words of similar import, in grammar, and in sense; they are subject to the same construction, and we think no reason has yet been given for imposing an important restriction on one part of them, which does not equally show that the same restriction might be imposed also on the other part.

We have already endeavored to maintain, that one great political object intended by the Constitution would be defeated, if this construction were allowed to prevail. As an object of political regulation, it was not important to prevent the States

from passing bankrupt laws applicable to present debts, while the power was left to them in regard to future debts; nor was it at all important, in a political point of view, to prohibit tender laws as to future debts, while it was yet left to the States to pass laws for the discharge of such debts, which, after all, are little different in principle from tender laws. Look at the law before the court in this view. It provides, that, if the debtor will surrender, offer, or tender to trustees, for the benefit of his creditors, all his estate and effects, he shall be discharged from all his debts. If it had authorized a tender of any thing but money to any one creditor, though it were of a value equal to the debt, and thereupon provided for a discharge, it would have been clearly invalid. Yet it is maintained to be good, merely because it is made for all creditors, and seeks a discharge from all debts; although the thing tendered may not be equivalent to a shilling in the pound of those debts. This shows, again, very clearly, how the Constitution has failed of its purpose, if, having in terms prohibited all tender laws, and taken so much pains to establish a uniform medium of payment, it has yet left the States the power of discharging debts, as they may see fit, without any payment at all.

To recapitulate what has been said, we maintain, first, that the Constitution, by its grants to Congress and its prohibitions on the States, has sought to establish one uniform standard of value, or medium of payment. Second, that, by like means, it has endeavored to provide for one uniform mode of discharging debts, when they are to be discharged without payment. Third, that these objects are connected, and that the first loses much of its importance, if the last, also, be not accomplished. Fourth, that, reading the grant to Congress and the prohibition on the States together, the inference is strong that the Constitution intended to confer an exclusive power to pass bankrupt laws on Congress. Fifth, that the prohibition in the tenth section reaches to all contracts, existing or future, in the same way that the other prohibition in the same section extends to all debts existing or future. Sixthly, that, upon any other construction, one great political object of the Constitution will fail of its accomplishment.

The Murder of Captain Joseph White*

Introductory Note†

The following argument was addressed to the jury at a trial for a remarkable murder. A more extraordinary case never occurred in this country, nor is it equalled in strange interest by any trial in the French *Causes Célèbres* or the English *State Trials*. Deep sensation and intense curiosity were excited through the whole country, at the time of the occurrence of the event, not only by the atrocity of the crime, but by the position of the victim, and the romantic incidents in the detection and fate of the assassin and his accomplices.

The following outline of the facts will assist the reader to understand the bearings of the argument.

Joseph White, Esq., was found murdered in his bed, in his mansion-house, on the morning of the 7th of April, 1830. He was a wealthy merchant of Salem, eighty-two years of age, and had for many years given up active business. His servant-man rose that morning at six o'clock, and on going down into the kitchen, and opening the shutters of the window, saw that the back window of the east parlor was open, and that a plank was raised to the window from the back yard; he then went into the parlor, but saw no trace of any person having been there. He went to the apartment of the maid-servant, and told her, and then into Mr. White's chamber by its back door, and saw that the door of his chamber, leading into the front entry, was open. On approaching the bed he found the bed-clothes turned down, and Mr. White dead, his countenance pallid, and his night-clothes and bed

* Argument on the Trial of John Francis Knapp, for the Murder of Joseph White, Esq., of Salem, in Essex County, Massachusetts, on the Night of the 6th of April, 1830.

† This interesting and valuable account of the crime which led to the following speech to the jury was written by the late Honorable Benjamin Merrill, of Salem.

drenched in blood. He hastened to the neighboring houses to make known the event. He and the maid-servant were the only persons who slept in the house that night, except Mr. White himself, whose niece, Mrs. Beckford, his housekeeper, was then absent on a visit to her daughter, at Wenham.

The physicians and the coroner's jury, who were called to examine the body, found on it thirteen deep stabs, made as if by a sharp dirk or poniard, and the appearance of a heavy blow on the left temple, which had fractured the skull, but not broken the skin. The body was cold, and appeared to have been lifeless many hours.

On examining the apartments of the house, it did not appear that any valuable articles had been taken, or the house ransacked for them; there was a *rouleau* of doubloons in an iron chest in his chamber, and costly plate in other apartments, none of which was missing.

The perpetration of such an atrocious crime, in the most populous and central part of the town and in the most compactly built street, and under circumstances indicating the utmost coolness, deliberation, and audacity, deeply agitated and aroused the whole community; ingenuity was baffled in attempting even to conjecture a *motive* for the deed; and all the citizens were led to fear that the same fate might await them in the defenceless and helpless hours of slumber. For several days, persons passing through the streets might hear the continual sound of the hammer, while carpenters and smiths were fixing bolts to doors and fastenings to windows. Many, for defence, furnished themselves with cutlasses, fire-arms, and watch-dogs. Large rewards for the detection of the author or authors of the murder were offered by the heirs of the deceased, by the selectmen of the town, and by the Governor of the State. The citizens held a public meeting, and appointed a Committee of Vigilance, of twenty-seven members, to make all possible exertions to ferret out the offenders.

While the public mind was thus excited and anxious, it was announced that a bold attempt at highway robbery was made in Wenham by three footpads, on Joseph J. Knapp, Jr. and John Francis Knapp, on the evening of the 27th of April, while they were returning in a chaise from Salem to their residence in Wenham. They appeared before the investigating committee, and testified that, after nine o'clock, near the Wenham Pond, they discovered three men approaching. One came near, seized the bridle, and stopped the horse, while the other two came, one on each side, and seized a trunk in the bottom of the chaise. Frank Knapp drew a sword from his cane and made a thrust at one, and Joseph with the but-end of his whip gave the other a heavy blow across the face. This bold resistance made them fall back. Joseph sprung from the chaise to assail the robbers. One of them then gave a shrill

whistle, when they fled, and, leaping over the wall, were soon lost in the darkness. One had a weapon like an ivory dirk-handle, was clad in a sailor's short jacket, cap, and had whiskers; another wore a long coat, with bright buttons; all three were good-sized men. Frank, too, sprung from the chaise, and pursued with vigor, but all in vain.

The account of this unusual and bold attempt at robbery, thus given by the Knapps, was immediately published in the Salem newspapers, with the editorial remark, that "these gentlemen are well known in this town, and their respectability and veracity are not questioned by any of our citizens."

Not the slightest clew to the murder could be found for several weeks, and the mystery seemed to be impenetrable. At length a rumor reached the ear of the committee that a prisoner in the jail at New Bedford, seventy miles from Salem, confined there on a charge of shoplifting, had intimated that he could make important disclosures. A confidential messenger was immediately sent, to ascertain what he knew on the subject. The prisoner's name was Hatch; he had been committed before the murder. He stated that, some months before the murder, while he was at large, he had associated in Salem with Richard Crowninshield, Jr., of Danvers, and had often heard Crowninshield express his intention to destroy the life of Mr. White. Crowninshield was a young man, of bad reputation; though he had never been convicted of any offence, he was strongly suspected of several heinous robberies. He was of dark and reserved deportment, temperate and wicked, daring and wary, subtle and obdurate, of great adroitness, boldness, and self-command. He had for several years frequented the haunts of vice in Salem; and though he was often spoken of as a dangerous man, his person was known to few, for he never walked the streets by daylight. Among his few associates he was a leader and a despot.

The disclosures of Hatch received credit. When the Supreme Court met at Ipswich, the Attorney-General, Morton, moved for a writ of *habeas corpus ad testif.*, and Hatch was carried in chains from New Bedford before the grand jury, and on his testimony an indictment was found against Crowninshield. Other witnesses testified that, on the night of the murder, his brother, George Crowninshield, Colonel Benjamin Selman, of Marblehead, and Daniel Chase, of Lynn, were together in Salem, at a gambling-house usually frequented by Richard; these were indicted as accomplices in the crime. They were all arrested on the 2d of May, arraigned on the indictment, and committed to prison to await the sitting of a court that should have jurisdiction of the offence.

The Committee of Vigilance, however, continued to hold frequent meetings in order to discover further proof, for it was doubted by many

whether the evidence already obtained would be sufficient to convict the accused.

A fortnight afterwards, on the 15th of May, Captam Joseph J. Knapp, a shipmaster and merchant, a man of good character, received by mail the following letter:—

CHARLES GRANT, JR., TO JOSEPH J. KNAPP.

"*Belfast, May* 12, 1830.

"DEAR SIR,—I have taken the pen at this time to address an utter stranger, and, strange as it may seem to you, it is for the purpose of requesting the loan of three hundred and fifty dollars, for which I can give you no security but my word, and in this case consider this to be sufficient. My call for money at this time is pressing, or I would not trouble you; but with that sum, I have the prospect of turning it to so much advantage, as to be able to refund it with interest in the course of six months. At all events, I think it will be for your interest to comply with my request, and that immediately — that is, not to put off any longer than you receive this. Then set down and inclose me the money with as much despatch as possible, for your own interest. This, Sir, is my advice; and if you do not comply with it, the short period between now and November will convince you that you have denied a request, the granting of which will never injure you, the refusal of which will ruin you. Are you surprised at this assertion — rest assured that I make it, reserving to myself the reasons and a series of facts, which are founded on such a bottom as will bid defiance to property or quality. It is useless for me to enter into a discussion of facts which must inevitably harrow up your soul. No, I will merely tell you that I am acquainted with your brother Franklin, and also the business that he was transacting for you on the 2d of April last; and that I think that you was very extravagant in giving one thousand dollars to the person that would execute the business for you. But you know best about that, you see that such things will leak out. To conclude, Sir, I will inform you that there is a gentleman of my acquaintance in Salem, that will observe that you do not leave town before the first of June, giving you sufficient time between now and then to comply with my request; and if I do not receive a line from you, together with the above sum, before the 22d of this month, I shall wait upon you with an assistant. I have said enough to convince you of my knowledge, and merely inform you that you can, when you answer, be as brief as possible.

"Direct yours to

"CHARLES GRANT, JR., of Prospect, Maine.

This letter was an unintelligible enigma to Captain Knapp; he knew no man of the name of Charles Grant, Jr., and had no acquaintance at Belfast, a town in Maine, two hundred miles distant from Salem. After poring over it in vain, he handed it to his son, Nathaniel Phippen Knapp, a young lawyer; to him also the letter was an inexplicable riddle. The receiving of such a *threatening* letter, at a time when so many felt insecure, and were apprehensive of danger, demanded their attention.

Captain Knapp and his son Phippen, therefore, concluded to ride to Wenham, seven miles distant, and show the letter to Captain Knapp's other two sons, Joseph J. Knapp, Jr., and John Francis Knapp, who were then residing at Wenham with Mrs. Beckford, the niece and late housekeeper of Mr. White and the mother of the wife of J. J. Knapp, Jr. The latter perused the letter, told his father it "contained a devilish lot of trash," and requested him to hand it to the Committee of Vigilance. Captain Knapp, on his return to Salem that evening, accordingly delivered the letter to the chairman of the committee.

The next day J. J. Knapp, Jr. went to Salem, and requested one of his friends to drop into the Salem post-office the two following pseudonymous letters.

"*May* 13, 1830.

"GENTLEMEN OF THE COMMITTEE OF VIGILANCE,—Hearing that you have taken up four young men on suspicion of being concerned in the murder of Mr. White, I think it time to inform you that Steven White came to me one night and told me, if I would *remove* the old gentleman, he would give me five thousand dollars; he said he was afraid he would alter his will if he lived any longer. I told him I would do it, but I was afeared to go into the house, so he said he would go with me, that he would try to get into the house in the evening and open the window, would then go home and go to bed and meet me again about eleven. I found him, and we both went into his chamber. I struck him on the head with a heavy piece of lead, and then stabbed him with a dirk; he made the finishing strokes with another. He promised to send me the money next evening, and has not sent it yet, which is the reason that I mention this. Yours, &c.,

"GRANT."

This letter was directed on the outside to the "Hon. Gideon Barstow, Salem," and put into the post-office on Sunday evening, May 16, 1830.

"*Lynn, May* 12, 1830.

"Mr. White will send the $5,000, or a part of it, before to-morrow night, or suffer the painful consequences.

"N. CLAXTON, 4TH."

This letter was addressed to the "Hon. Stephen White, Salem, Mass.," and was also put into the post-office in Salem on Sunday evening.

When Knapp delivered these letters to his friend, he said his father had received an anonymous letter, and "What I want you for is to put these in the post-office in order to nip this silly affair in the bud."

The Hon. Stephen White, mentioned in these letters, was a nephew of Joseph White, and the legatee of the principal part of his large property.

When the Committee of Vigilance read and considered the letter, purporting to be signed by Charles Grant, Jr., which had been delivered

to them by Captain Knapp, they were impressed with the belief that it contained a clew which might lead to important disclosures. As they had spared no pains or expense in their investigations, they immediately despatched a discreet messenger to Prospect, in Maine; he explained his business confidentially to the postmaster there, deposited a letter addressed to Charles Grant, Jr., and awaited the call of Grant to receive it. He soon called for it, when an officer, stationed in the house, stepped forward and arrested Grant. On examining him, it appeared that his true name was Palmer, a young man of genteel appearance, resident in the adjoining town of Belfast. He had been a convict in Maine, and had served a term in the State's prison in that State. Conscious that the circumstances justified the belief that he had had a hand in the murder, he readily made known, while he protested his own innocence, that he could unfold the whole mystery. He then disclosed that he had been an associate of R. Crowninshield, Jr., and George Crowninshield; had spent part of the winter at Danvers and Salem, under the name of Carr; part of the time he had been their inmate, concealed in their father's house in Danvers; that on the 2d of April he saw from the windows of the house Frank Knapp and a young man named Allen ride up to the house; that George walked away with Frank, and Richard with Allen; that on their return, George told Richard that Frank wished them to undertake to kill Mr. White, and that J. J. Knapp, Jr. would pay one thousand dollars for the job. They proposed various modes of executing it, and asked Palmer to be concerned, which he declined. George said the housekeeper would be away at the time; that the object of Joseph J. Knapp, Jr. was to destroy the will, because it gave most of the property to Stephen White; that Joseph J. Knapp, Jr. was first to destroy the will; that he could get from the housekeeper the keys of the iron chest in which it was kept; that Frank called again the same day, in a chaise, and rode away with Richard; and that on the night of the murder Palmer staid at the Half-way House, in Lynn.

The messenger, on obtaining this disclosure from Palmer, without delay communicated it by mail to the Committee, and on the 26th of May, a warrant was issued against Joseph J. Knapp, Jr. and John Francis Knapp, and they were taken into custody at Wenham, where they were residing in the family of Mrs. Beckford, mother of the wife of Joseph J. Knapp, Jr. They were then imprisoned to await the arrival of Palmer, for their examination.

The two Knapps were young shipmasters, of a respectable family.

Joseph J. Knapp, Jr., on the third day of his imprisonment, made a full confession that he projected the murder. He knew that Mr. White had made his will, and given to Mrs. Beckford a legacy of fifteen thousand dollars; but if he died without leaving a will, he expected she would inherit

nearly two hundred thousand dollars. In February he made known to his brother his desire to make way with Mr. White, intending first to abstract and destroy the will. Frank agreed to employ an assassin, and negotiated with R. Crowninshield, Jr., who agreed to do the deed for a reward of one thousand dollars; Joseph agreed to pay that sum, and as he had access to the house at his pleasure, he was to unbar and unfasten the back window, so that Crowninshield might gain easy entrance. Four days before the murder, while they were deliberating on the mode of compassing it, he went into Mr. White's chamber, and, finding the key in the iron chest, unlocked it, took the will, put it in his chaise-box, covered it with hay, carried it to Wenham, kept it till after the murder, and then burned it. After securing the will, he gave notice to Crowninshield that all was ready. In the evening of that day he had a meeting with Crowninshield at the centre of the common, who showed him a bludgeon and dagger, with which the murder was to be committed. Knapp asked him if he meant to do it that night; Crowninshield said he thought not, he did not feel like it; Knapp then went to Wenham. Knapp ascertained on Sunday, the 4th of April, that Mr. White had gone to take tea with a relative in Chestnut Street. Crowninshield intended to dirk him on his way home in the evening, but Mr. White returned before dark. It was next arranged for the night of the 6th, and Knapp was on some pretext to prevail on Mrs. Beckford to visit her daughters at Wenham, and to spend the night there. He said that, all preparations being thus complete, Crowninshield and Frank met about ten o'clock in the evening of the 6th, in Brown Street, which passes the rear of the garden of Mr. White, and stood some time in a spot from which they could observe the movements in the house, and perceive when Mr. White and his two servants retired to bed. Crowninshield requested Frank to go home; he did so, but soon returned to the same spot. Crowninshield, in the mean time, had started and passed round through Newbury Street and Essex Street to the front of the house, entered the postern gate, passed to the rear of the house, placed a plank against the house, climbed to the window, opened it, entered the house alone, passed up the staircase, opened the door of the sleeping-chamber, approached the bedside, gave Mr. White a heavy and mortal blow on the head with a bludgeon, and then with a dirk gave him many stabs in his body. Crowninshield said, that after he had "done for the old man," he put his fingers on his pulse to make certain he was dead. He then retired from the house, hurried back through Brown Street, where he met Frank, waiting to learn the event. Crowninshield ran down Howard Street, a solitary place, and hid the club under the steps of a meeting-house. He then went home to Danvers.

Joseph confessed further that the account of the Wenham robbery,

on the 27th of April, was a sheer fabrication. After the murder Crowninshield went to Wenham in company with Frank to call for the one thousand dollars. He was not able to pay the whole, but gave him one hundred five-franc pieces. Crowninshield related to him the particulars of the murder, told him where the club was hid, and said he was sorry Joseph had not got the right will, for if he had known there was another, he would have got it. Joseph sent Frank afterwards to find and destroy the club, but he said he could not find it. When Joseph made the confession, he told the place where the club was concealed, and it was there found; it was heavy, made of hickory, twenty-two and a half inches long, of a smooth surface and large oval head, loaded with lead, and of a form adapted to give a mortal blow on the skull without breaking the skin; the handle was suited for a firm grasp. Crowninshield said he turned it in a lathe. Joseph admitted he wrote the two anonymous letters.

Crowninshield had hitherto maintained a stoical composure of feeling; but when he was informed of Knapp's arrest, his knees smote beneath him, the sweat started out on his stern and pallid face, and he subsided upon his bunk.

Palmer was brought to Salem in irons on the 3d of June, and committed to prison. Crowninshield saw him taken from the carriage. He was put in the cell directly under that in which Crowninshield was kept. Several members of the Committee entered Palmer's cell to talk with him; while they were talking, they heard a loud whistle, and, on looking up, saw that Crowninshield had picked away the mortar from the crevice between the blocks of the granite floor of his cell. After the loud whistle, he cried out, "Palmer! Palmer!" and soon let down a string, to which were tied a pencil and a slip of paper. Two lines of poetry were written on the paper, in order that, if Palmer was really there, he should make it known by capping the verses. Palmer shrunk away into a corner, and was soon transferred to another cell. He seemed to stand in awe of Crowninshield.

On the 12th of June a quantity of stolen goods was found concealed in the barn of Crowninshield, in consequence of information from Palmer.

Crowninshield, thus finding the proofs of his guilt and depravity thicken, on the 15th of June committed suicide by hanging himself to the bars of his cell with a handkerchief. He left letters to his father and brother, expressing in general terms the viciousness of his life, and his hopelessness of escape from punishment. When his associates in guilt heard his fate, they said it was not unexpected by them, for they had often heard him say he would never live to submit to an ignominious punishment.

A special term of the Supreme Court was held at Salem on the 20th of July, for the trial of the prisoners charged with the murder; it continued in session till the 20th of August, with a few days' intermission. An indictment for the murder was found against John Francis Knapp, as principal, and Joseph J. Knapp, Jr. and George Crowninshield, as accessories. Selman and Chase were discharged by the Attorney-General.

The principal, John Francis Knapp, was first put on trial. As the law then stood, an accessory in a murder could not be tried until a principal had been convicted. He was defended by Messrs. Franklin Dexter and William H. Gardiner, advocates of high reputation for ability and eloquence; the trial was long and arduous, and the witnesses numerous. His brother Joseph, who had made a full confession, on the government's promise of impunity if he would in good faith testify the truth, was brought into court, called to the stand as a witness, but declined to testify. To convict the prisoner, it was necessary for the government to prove that he was *present*, actually or constructively, as an aider or abettor in the murder. The evidence was strong that there was a conspiracy to commit the murder, that the prisoner was one of the conspirators, that at the time of the murder he was in Brown Street at the rear of Mr. White's garden, and the jury were satisfied that he was in that place to aid and abet in the murder, ready to afford assistance, if necessary. He was convicted.

Joseph J. Knapp, Jr., was afterwards tried as an accessory before the fact, and convicted.

George Crowninshield proved an *alibi*, and was discharged.

The execution of John Francis Knapp and Joseph J. Knapp, Jr. closed the tragedy.

If Joseph, after turning state's evidence, had not changed his mind, neither he nor his brother, nor any of the conspirators, could have been convicted; if he had testified, and disclosed the whole truth, it would have appeared that John Francis Knapp was in Brown Street, not to render assistance to the assassin; but that Crowninshield, when he started to commit the murder, requested Frank to go home and go to bed; that Frank did go home, retire to bed, soon after arose, secretly left his father's house, and hastened to Brown Street, to await the coming out of the assassin, in order to learn whether the deed was accomplished, and all the particulars. If Frank had not been convicted as principal, none of the accessories could by law have been convicted. Joseph would not have been even tried, for the government stipulated that, if he would be a witness for the State, he should go clear.

The whole history of this occurrence is of romantic interest. The murder itself, the *corpus delicti*, was strange; planned with delibera-

tion and sagacity, and executed with firmness and vigor. While conjecture was baffled in ascertaining either the motive or the perpetrator, it was certain that the assassin had acted upon design, and not at random. He must have had knowledge of the house, for the window had been unfastened from within. He had entered stealthily, threaded his way in silence through the apartments, corridors, and staircases, and coolly given the mortal blow. To make assurance doubly sure, he inflicted many fatal stabs, "the least a death to nature," and staid not his hand till he had deliberately felt the pulse of his victim, to make certain that life was extinct.

It was strange that Crowninshield, the real assassin, should have been indicted and arrested on the testimony of Hatch, who was himself in prison, in a distant part of the State, at the time of the murder, and had no actual knowledge on the subject.

It was very strange that J. J. Knapp, Jr. should have been the instrument of bringing to light the mystery of the whole murderous conspiracy; for when he received from the hand of his father the threatening letter of Palmer, consciousness of guilt so confounded his faculties, that, instead of destroying it, he stupidly handed it back, and requested his father to deliver it to the Committee of Vigilance.

It was strange that the murder should have been committed on a mistake in law. Joseph, some time previous to the murder, had made inquiry how Mr. White's estate would be distributed in case he died without a will, and had been erroneously told that Mrs. Beckford, his mother-in-law, the sole issue and representative of a deceased sister of Mr. White, would inherit half of the estate, and that the four children and representatives of a deceased brother of Mr. White, of whom the Hon. Stephen White was one, would inherit the other half. Joseph had privately read the will, and knew that Mr. White had bequeathed to Mrs. Beckford much less than half.

It was strange that the murder should have been committed on a mistake in fact also. Joseph furtively abstracted *a* will, and expected Mr. White would die intestate; but after the decease, *the* will, the *last* will, was found by his heirs in its proper place; and it could never have been known or conjectured, without the aid of Joseph's confession, that he had made either of those blunders.

Finally, it was a strange fact that Knapp should, on the night following the murder, have watched with the mangled corpse, and at the funeral followed the hearse as one of the chief mourners, without betraying on either occasion the slightest emotion which could awaken a suspicion of his guilt.

The following note was prefixed to this argument in the former edition.

Mr. White, a highly respectable and wealthy citizen of Salem, about eighty years of age, was found, on the morning of the 7th of April, 1830, in his bed murdered, under such circumstances as to create a strong sensation in that town and throughout the community.

Richard Crowninshield, George Crowninshield, Joseph J. Knapp, and John F. Knapp were, a few weeks after, arrested on a charge of having perpetrated the murder, and committed for trial. Joseph J. Knapp soon after, under the promise of favor from government, made a full confession of the crime and the circumstances attending it. In a few days after this disclosure was made, Richard Crowninshield, who was supposed to have been the principal assassin, committed suicide.

A special session of the Supreme Court was ordered by the legislature, for the trial of the prisoners, at Salem, in July. At that time, John F. Knapp was indicted as principal in the murder, and George Crowninshield and Joseph J. Knapp as accessories.

On account of the death of Chief Justice Parker, which occurred on the 26th of July, the court adjourned to Tuesday, the 3d day of August, when it proceeded in the trial of John F. Knapp. Joseph J. Knapp, being called upon, refused to testify, and the pledge of the government was withdrawn.

At the request of the prosecuting officers of the government, Mr. Webster appeared as counsel, and assisted in the trial.

Mr. Franklin Dexter addressed the jury on behalf of the prisoner, and was succeeded by Mr. Webster in the following speech.

I AM little accustomed, Gentlemen, to the part which I am now attempting to perform. Hardly more than once or twice has it happened to me to be concerned on the side of the government in any criminal prosecution whatever; and never, until the present occasion, in any case affecting life.

But I very much regret that it should have been thought necessary to suggest to you that I am brought here to "hurry you against the law and beyond the evidence." I hope I have too much regard for justice, and too much respect for my own character, to attempt either; and were I to make such attempt, I am sure that in this court nothing can be carried against the law, and that gentlemen, intelligent and just as you are, are

not, by any power, to be hurried beyond the evidence. Though I could well have wished to shun this occasion, I have not felt at liberty to withhold my professional assistance, when it is supposed that I may be in some degree useful in investigating and discovering the truth respecting this most extraordinary murder. It has seemed to be a duty incumbent on me, as on every other citizen, to do my best and my utmost to bring to light the perpetrators of this crime. Against the prisoner at the bar, as an individual, I cannot have the slightest prejudice. I would not do him the smallest injury or injustice. But I do not affect to be indifferent to the discovery and the punishment of this deep guilt. I cheerfully share in the opprobrium, how great soever it may be, which is cast on those who feel and manifest an anxious concern that all who had a part in planning, or a hand in executing, this deed of midnight assassination, may be brought to answer for their enormous crime at the bar of public justice.

Gentlemen, it is a most extraordinary case. In some respects, it has hardly a precedent anywhere; certainly none in our New England history. This bloody drama exhibited no suddenly excited, ungovernable rage. The actors in it were not surprised by any lion-like temptation springing upon their virtue, and overcoming it, before resistance could begin. Nor did they do the deed to glut savage vengeance, or satiate long-settled and deadly hate. It was a cool, calculating, money-making murder. It was all "hire and salary, not revenge." It was the weighing of money against life; the counting out of so many pieces of silver against so many ounces of blood.

An aged man, without an enemy in the world, in his own house, and in his own bed, is made the victim of a butcherly murder, for mere pay. Truly, here is a new lesson for painters and poets. Whoever shall hereafter draw the portrait of murder, if he will show it as it has been exhibited, where such example was last to have been looked for, in the very bosom of our New England society, let him not give it the grim visage of Moloch, the brow knitted by revenge, the face black with settled hate, and the blood-shot eye emitting livid fires of malice. Let him draw, rather, a decorous, smooth-faced, bloodless demon; a picture in repose, rather than in action; not so much an example of human nature in its depravity, and in its parox-

ysms of crime, as an infernal being, a fiend, in the ordinary display and development of his character.

The deed was executed with a degree of self-possession and steadiness equal to the wickedness with which it was planned. The circumstances now clearly in evidence spread out the whole scene before us. Deep sleep had fallen on the destined victim, and on all beneath his roof. A healthful old man, to whom sleep was sweet, the first sound slumbers of the night held him in their soft but strong embrace. The assassin enters, through the window already prepared, into an unoccupied apartment. With noiseless foot he paces the lonely hall, half lighted by the moon; he winds up the ascent of the stairs, and reaches the door of the chamber. Of this, he moves the lock, by soft and continued pressure, till it turns on its hinges without noise; and he enters, and beholds his victim before him. The room is uncommonly open to the admission of light. The face of the innocent sleeper is turned from the murderer, and the beams of the moon, resting on the gray locks of his aged temple, show him where to strik[redacted]. The fatal blow is given! and the victim passes, without a struggle or a motion, from the repose of sleep to the repose of death! It is the assassin's purpose to make sure work; and he plies the dagger, though it is obvious that life has been destroyed by the blow of the bludgeon. He even raises the aged arm, that he may not fail in his aim at the heart, and replaces it again over the wounds of the poniard! To finish the picture, he explores the wrist for the pulse! He feels for it, and ascertains that it beats no longer! It is accomplished. The deed is done. He retreats, retraces his steps to the window, passes out through it as he came in, and escapes. He has done the murder. No eye has seen him, no ear has heard him. The secret is his own, and it is safe!

Ah! Gentlemen, that was a dreadful mistake. Such a secret can be safe nowhere. The whole creation of God has neither nook nor corner where the guilty can bestow it, and say it is safe. Not to speak of that eye which pierces through all disguises, and beholds every thing as in the splendor of noon, such secrets of guilt are never safe from detection, even by men. True it is, generally speaking, that "murder will out." True it is, that Providence hath so ordained, and doth so govern things, that those who break the great law of Heaven by shedding

man's blood seldom succeed in avoiding discovery. Especially, in a case exciting so much attention as this, discovery must come, and will come, sooner or later. A thousand eyes turn at once to explore every man, every thing, every circumstance, connected with the time and place; a thousand ears catch every whisper; a thousand excited minds intensely dwell on the scene, shedding all their light, and ready to kindle the slightest circumstance into a blaze of discovery. Meantime the guilty soul cannot keep its own secret. It is false to itself; or rather it feels an irresistible impulse of conscience to be true to itself. It labors under its guilty possession, and knows not what to do with it. The human heart was not made for the residence of such an inhabitant. It finds itself preyed on by a torment, which it dares not acknowledge to God or man. A vulture is devouring it, and it can ask no sympathy or assistance, either from heaven or earth. The secret which the murderer possesses soon comes to possess him; and, like the evil spirits of which we read, it overcomes him, and leads him whithersoever it will. He feels it beating at his heart, rising to his throat, and demanding disclosure. He thinks the whole world sees it in his face, reads it in his eyes, and almost hears its workings in the very silence of his thoughts. It has become his master. It betrays his discretion, it breaks down his courage, it conquers his prudence. When suspicions from without begin to embarrass him, and the net of circumstance to entangle him, the fatal secret struggles with still greater violence to burst forth. It must be confessed, it will be confessed; there is no refuge from confession but suicide, and suicide is confession.

Much has been said, on this occasion, of the excitement which has existed, and still exists, and of the extraordinary measures taken to discover and punish the guilty. No doubt there has been, and is, much excitement, and strange indeed it would be had it been otherwise. Should not all the peaceable and well-disposed naturally feel concerned, and naturally exert themselves to bring to punishment the authors of this secret assassination? Was it a thing to be slept upon or forgotten? Did you, Gentlemen, sleep quite as quietly in your beds after this murder as before? Was it not a case for rewards, for meetings, for committees, for the united efforts of all the good, to find out a band of murderous conspirators, of midnight ruf-

fians, and to bring them to the bar of justice and law? If this be excitement, is it an unnatural or an improper excitement?

It seems to me, Gentlemen, that there are appearances of another feeling, of a very different nature and character; not very extensive, I would hope, but still there is too much evidence of its existence. Such is human nature, that some persons lose their abhorrence of crime in their admiration of its magnificent exhibitions. Ordinary vice is reprobated by them, but extraordinary guilt, exquisite wickedness, the high flights and poetry of crime, seize on the imagination, and lead them to forget the depths of the guilt, in admiration of the excellence of the performance, or the unequalled atrocity of the purpose. There are those in our day who have made great use of this infirmity of our nature, and by means of it done infinite injury to the cause of good morals. They have affected not only the taste, but I fear also the principles, of the young, the heedless, and the imaginative, by the exhibition of interesting and beautiful monsters. They render depravity attractive, sometimes by the polish of its manners, and sometimes by its very extravagance; and study to show off crime under all the advantages of cleverness and dexterity. Gentlemen, this is an extraordinary murder, but it is still a murder. We are not to lose ourselves in wonder at its origin, or in gazing on its cool and skilful execution. We are to detect and to punish it; and while we proceed with caution against the prisoner, and are to be sure that we do not visit on his head the offences of others, we are yet to consider that we are dealing with a case of most atrocious crime, which has not the slightest circumstance about it to soften its enormity. It is murder; deliberate, concerted, malicious murder.

Although the interest of this case may have diminished by the repeated investigation of the facts; still, the additional labor which it imposes upon all concerned is not to be regretted, if it should result in removing all doubts of the guilt of the prisoner.

The learned counsel for the prisoner has said truly, that it is your individual duty to judge the prisoner; that it is your individual duty to determine his guilt or innocence; and that you are to weigh the testimony with candor and fairness. But much at the same time has been said, which, although it would seem to have no distinct bearing on the trial, cannot be passed over without some notice.

A tone of complaint so peculiar has been indulged, as would almost lead us to doubt whether the prisoner at the bar, or the managers of this prosecution, are now on trial. Great pains have been taken to complain of the manner of the prosecution. We hear of getting up a case; of setting in motion trains of machinery; of foul testimony; of combinations to overwhelm the prisoner; of private prosecutors; that the prisoner is hunted, persecuted, driven to his trial; that every body is against him; and various other complaints, as if those who would bring to punishment the authors of this murder were almost as bad as they who committed it.

In the course of my whole life, I have never heard before so much said about the particular counsel who happen to be employed; as if it were extraordinary that other counsel than the usual officers of the government should assist in the management of a case on the part of the government. In one of the last criminal trials in this county, that of Jackman for the "Goodridge robbery" (so called), I remember that the learned head of the Suffolk Bar, Mr. Prescott, came down in aid of the officers of the government. This was regarded as neither strange nor improper. The counsel for the prisoner, in that case, contented themselves with answering his arguments, as far as they were able, instead of carping at his presence.

Complaint is made that rewards were offered, in this case, and temptations held out to obtain testimony. Are not rewards always offered, when great and secret offences are committed? Rewards were offered in the case to which I have alluded; and every other means taken to discover the offenders, that ingenuity or the most persevering vigilance could suggest. The learned counsel have suffered their zeal to lead them into a strain of complaint at the manner in which the perpetrators of this crime were detected, almost indicating that they regard it as a positive injury to them to have found out their guilt. Since no man witnessed it, since they do not now confess it, attempts to discover it are half esteemed as officious intermeddling and impertinent inquiry.

It is said, that here even a Committee of Vigilance was appointed. This is a subject of reiterated remark. This committee are pointed at, as though they had been officiously intermeddling with the administration of justice. They are said to have

been "laboring for months" against the prisoner. Gentlemen, what must we do in such a case? Are people to be dumb and still, through fear of over-doing? Is it come to this, that an effort cannot be made, a hand cannot be lifted, to discover the guilty, without its being said there is a combination to overwhelm innocence? Has the community lost all moral sense? Certainly, a community that would not be roused to action upon an occasion such as this was, a community which should not deny sleep to their eyes, and slumber to their eyelids, till they had exhausted all the means of discovery and detection, must indeed be lost to all moral sense, and would scarcely deserve protection from the laws. The learned counsel have endeavored to persuade you, that there exists a prejudice against the persons accused of this murder. They would have you understand that it is not confined to this vicinity alone; but that even the legislature have caught this spirit. That through the procurement of the gentleman here styled private prosecutor, who is a member of the Senate, a special session of this court was appointed for the trial of these offenders. That the ordinary movements of the wheels of justice were too slow for the purposes devised. But does not every body see and know, that it was matter of absolute necessity to have a special session of the court? When or how could the prisoners have been tried without a special session? In the ordinary arrangement of the courts, but one week in a year is allotted for the whole court to sit in this county. In the trial of all capital offences a majority of the court, at least, is required to be present. In the trial of the present case alone, three weeks have already been taken up. Without such special session, then, three years would not have been sufficient for the purpose. It is answer sufficient to all complaints on this subject to say, that the law was drawn by the late Chief Justice himself,* to enable the court to accomplish its duties, and to afford the persons accused an opportunity for trial without delay.

Again, it is said that it was not thought of making Francis Knapp, the prisoner at the bar, a PRINCIPAL till after the death of Richard Crowninshield, Jr.; that the present indictment is an afterthought; that "testimony was got up" for the occa-

* Chief Justice Parker.

sion. It is not so. There is no authority for this suggestion. The case of the Knapps had not then been before the grand jury. The officers of the government did not know what the testimony would be against them. They could not, therefore, have determined what course they should pursue. They intended to arraign all as principals who should appear to have been principals, and all as accessories who should appear to have been accessories. All this could be known only when the evidence should be produced.

But the learned counsel for the defendant take a somewhat loftier flight still. They are more concerned, they assure us, for the law itself, than even for their client. Your decision in this case, they say, will stand as a precedent. Gentlemen, we hope it will. We hope it will be a precedent both of candor and intelligence, of fairness and of firmness; a precedent of good sense and honest purpose pursuing their investigation discreetly, rejecting loose generalities, exploring all the circumstances, weighing each, in search of truth, and embracing and declaring the truth when found.

It is said, that "laws are made, not for the punishment of the guilty, but for the protection of the innocent." This is not quite accurate, perhaps, but if so, we hope they will be so administered as to give that protection. But who are the innocent whom the law would protect? Gentlemen, Joseph White was innocent. They are innocent who, having lived in the fear of God through the day, wish to sleep in his peace through the night, in their own beds. The law is established that those who live quietly may sleep quietly; that they who do no harm may feel none. The gentleman can think of none that are innocent except the prisoner at the bar, not yet convicted. Is a proved conspirator to murder innocent? Are the Crowninshields and the Knapps innocent? What is innocence? How deep stained with blood, how reckless in crime, how deep in depravity may it be, and yet retain innocence? The law is made, if we would speak with entire accuracy, to protect the innocent by punishing the guilty. But there are those innocent out of a court, as well as in; innocent citizens not suspected of crime, as well as innocent prisoners at the bar.

The criminal law is not founded in a principle of vengeance. It does not punish that it may inflict suffering. The humanity

of the law feels and regrets every pain it causes, every hour of restraint it imposes, and more deeply still every life it forfeits. But it uses evil as the means of preventing greater evil. It seeks to deter from crime by the example of punishment. This is its true, and only true main object. It restrains the liberty of the few offenders, that the many who do not offend may enjoy their liberty. It takes the life of the murderer, that other murders may not be committed. The law might open the jails, and at once set free all persons accused of offences, and it ought to do so if it could be made certain that no other offences would hereafter be committed; because it punishes, not to satisfy any desire to inflict pain, but simply to prevent the repetition of crimes. When the guilty, therefore, are not punished, the law has so far failed of its purpose; the safety of the innocent is so far endangered. Every unpunished murder takes away something from the security of every man's life. Whenever a jury, through whimsical and ill-founded scruples, suffer the guilty to escape, they make themselves answerable for the augmented danger of the innocent.

We wish nothing to be strained against this defendant. Why, then, all this alarm? Why all this complaint against the manner in which the crime is discovered? The prisoner's counsel catch at supposed flaws of evidence, or bad character of witnesses, without meeting the case. Do they mean to deny the conspiracy? Do they mean to deny that the two Crowninshields and the two Knapps were conspirators? Why do they rail against Palmer, while they do not disprove, and hardly dispute, the truth of any one fact sworn to by him? Instead of this, it is made matter of sentimentality that Palmer has been prevailed upon to betray his bosom companions and to violate the sanctity of friendship. Again I ask, Why do they not meet the case? If the fact is out, why not meet it? Do they mean to deny that Captain White is dead? One would have almost supposed even that, from some remarks that have been made. Do they mean to deny the conspiracy? Or, admitting a conspiracy, do they mean to deny only that Frank Knapp, the prisoner at the bar, was abetting in the murder, being present, and so deny that he was a principal? If a conspiracy is proved, it bears closely upon every subsequent subject of inquiry. Why do they not come to the fact?

Here the defence is wholly indistinct. The counsel neither take the ground, nor abandon it. They neither fly, nor light. They hover. But they must come to a closer mode of contest. They must meet the facts, and either deny or admit them. Had the prisoner at the bar, then, a knowledge of this conspiracy or not? This is the question. Instead of laying out their strength in complaining of the *manner* in which the deed is discovered, of the extraordinary pains taken to bring the prisoner's guilt to light, would it not be better to show there was no guilt? Would it not be better to show his innocence? They say, and they complain, that the community feel a great desire that he should be punished for his crimes. Would it not be better to convince you that he has committed no crime?

Gentlemen, let us now come to the case. Your first inquiry, on the evidence, will be, Was Captain White murdered in pursuance of a conspiracy, and was the defendant one of this conspiracy? If so, the second inquiry is, Was he so connected with the murder itself as that he is liable to be convicted as a *principal?* The defendant is indicted as a *principal.* If not guilty *as such*, you cannot convict him. The indictment contains three distinct classes of counts. In the first, he is charged as having done the deed with his own hand; in the second, as an aider and abettor to Richard Crowninshield, Jr., who did the deed; in the third, as an aider and abettor to some person unknown. If you believe him guilty on either of these counts, or in either of these ways, you must convict him.

It may be proper to say, as a preliminary remark, that there are two extraordinary circumstances attending this trial. One is, that Richard Crowninshield, Jr., the supposed immediate perpetrator of the murder, since his arrest, has committed suicide. He has gone to answer before a tribunal of perfect infallibility. The other is, that Joseph Knapp, the supposed originator and planner of the murder, having once made a full disclosure of the facts, under a promise of indemnity, is, nevertheless, not now a witness. Notwithstanding his disclosure and his promise of indemnity, he now refuses to testify. He chooses to return to his original state, and now stands answerable himself, when the time shall come for his trial. These circumstances it is fit you should remember, in your investigation of the case.

Your decision may affect more than the life of this defendant.

If he be not convicted as principal, no one can be. Nor can any one be convicted of a participation in the crime as accessory. The Knapps and George Crowninshield will be again on the community. This shows the importance of the duty you have to perform, and serves to remind you of the care and wisdom necessary to be exercised in its performance. But certainly these considerations do not render the prisoner's guilt any clearer, nor enhance the weight of the evidence against him. No one desires you to regard consequences in that light. No one wishes any thing to be strained, or too far pressed against the prisoner. Still, it is fit you should see the full importance of the duty which devolves upon you.

And now, Gentlemen, in examining this evidence, let us begin at the beginning, and see first what we know independent of the disputed testimony. This is a case of circumstantial evidence. And these circumstances, we think, are full and satisfactory. The case mainly depends upon them, and it is common that offences of this kind must be proved in this way. Midnight assassins take no witnesses. The evidence of the facts relied on has been somewhat sneeringly denominated by the learned counsel, "circumstantial stuff," but it is not such stuff as dreams are made of. Why does he not rend this stuff? Why does he not scatter it to the winds? He dismisses it a little too summarily. It shall be my business to examine this stuff, and try its cohesion.

The letter from Palmer at Belfast, is that no more than flimsy stuff?

The fabricated letters from Knapp to the committee and to Mr. White, are they nothing but stuff?

The circumstance, that the housekeeper was away at the time the murder was committed, as it was agreed she would be, is that, too, a useless piece of the same stuff?

The facts, that the key of the chamber door was taken out and secreted; that the window was unbarred and unbolted; are these to be so slightly and so easily disposed of?

It is necessary, Gentlemen, to settle now, at the commencement, the great question of a conspiracy. If there was none, or the defendant was not a party, then there is no evidence here to convict him. If there was a conspiracy, and he is proved to have been a party, then these two facts have a strong bearing

on others, and all the great points of inquiry. The defendant's counsel take no distinct ground, as I have already said, on this point, either to admit or to deny. They choose to confine themselves to a hypothetical mode of speech. They say, supposing there was a conspiracy, *non sequitur* that the prisoner is guilty as principal. Be it so. But still, if there was a conspiracy, and if he was a conspirator, and helped to plan the murder, this may shed much light on the evidence which goes to charge him with the execution of that plan.

We mean to make out the conspiracy; and that the defendant was a party to it; and then to draw all just inferences from these facts.

Let me ask your attention, then, in the first place, to those appearances, on the morning after the murder, which have a tendency to show that it was done in pursuance of a preconcerted plan of operation. What are they? A man was found murdered in his bed. No stranger had done the deed, no one unacquainted with the house had done it. It was apparent that somebody within had opened, and that somebody without had entered. There had obviously and certainly been concert and coöperation. The inmates of the house were not alarmed when the murder was perpetrated. The assassin had entered without any riot or any violence. He had found the way prepared before him. The house had been previously opened. The window was unbarred from within, and its fastening unscrewed. There was a lock on the door of the chamber in which Mr. White slept, but the key was gone. It had been taken away and secreted. The footsteps of the murderer were visible, out doors, tending toward the window. The plank by which he entered the window still remained. The road he pursued had been thus prepared for him. The victim was slain, and the murderer had escaped. Every thing indicated that somebody within had coöperated with somebody without. Every thing proclaimed that some of the inmates, or somebody having access to the house, had had a hand in the murder. On the face of the circumstances, it was apparent, therefore, that this was a premeditated, concerted murder; that there had been a conspiracy to commit it. Who, then, were the conspirators? If not now found out, we are still groping in the dark, and the whole tragedy is still a mystery.

If the Knapps and the Crowninshields were not the conspirators in this murder, then there is a whole set of conspirators not yet discovered. Because, independent of the testimony of Palmer and Leighton, independent of all disputed evidence, we know, from uncontroverted facts, that this murder was, and must have been, the result of concert and coöperation between two or more. We know it was not done without plan and deliberation; we see, that whoever entered the house, to strike the blow, was favored and aided by some one who had been previously in the house, without suspicion, and who had prepared the way. This is concert, this is coöperation, this is conspiracy. If the Knapps and the Crowninshields, then, were not the conspirators, who were? Joseph Knapp had a motive to desire the death of Mr. White, and that motive has been shown.

He was connected by marriage with the family of Mr. White. His wife was the daughter of Mrs. Beckford, who was the only child of a sister of the deceased. The deceased was more than eighty years old, and had no children. His only heirs were nephews and nieces. He was supposed to be possessed of a very large fortune, which would have descended, by law, to his several nephews and nieces in equal shares; or, if there was a will, then according to the will. But as he had but two branches of heirs, the children of his brother, Henry White, and of Mrs. Beckford, each of these branches, according to the common idea, would have shared one half of his property.

This popular idea is not legally correct. But it is common, and very probably was entertained by the parties. According to this idea, Mrs. Beckford, on Mr. White's death without a will, would have been entitled to one half of his ample fortune; and Joseph Knapp had married one of her three children. There was a will, and this will gave the bulk of the property to others; and we learn from Palmer that one part of the design was to destroy the will before the murder was committed. There had been a previous will, and that previous will was known or believed to have been more favorable than the other to the Beckford family. So that, by destroying the last will, and destroying the life of the testator at the same time, either the first and more favorable will would be set up, or the deceased would have no will, which would be, as was supposed,

still more favorable. But the conspirators not having succeeded in obtaining and destroying the last will, though they accomplished the murder, that will being found in existence and safe, and that will bequeathing the mass of the property to others, it seemed at the time impossible for Joseph Knapp, as for any one else, indeed, but the principal devisee, to have any motive which should lead to the murder. The key which unlocks the whole mystery is the knowledge of the intention of the conspirators to steal the will. This is derived from Palmer, and it explains all. It solves the whole marvel. It shows the motive which actuated those, against whom there is much evidence, but who, without the knowledge of this intention, were not seen to have had a motive. This intention is proved, as I have said, by Palmer; and it is so congruous with all the rest of the case, it agrees so well with all facts and circumstances, that no man could well withhold his belief, though the facts were stated by a still less credible witness. If one desirous of opening a lock turns over and tries a bunch of keys till he finds one that will open it, he naturally supposes he has found *the* key of *that* lock. So, in explaining circumstances of evidence which are apparently irreconcilable or unaccountable, if a fact be suggested which at once accounts for all, and reconciles all, by whomsoever it may be stated, it is still difficult not to believe that such fact is the true fact belonging to the case. In this respect, Palmer's testimony is singnlarly confirmed. If it were false, his ingenuity could not furnish us such clear exposition of strange appearing circumstances. Some truth not before known can alone do that.

When we look back, then, to the state of things immediately on the discovery of the murder, we see that suspicion would naturally turn at once, not to the heirs at law, but to those principally benefited by the will. They, and they alone, would be supposed or seem to have a direct object for wishing Mr. White's life to be terminated. And, strange as it may seem, we find counsel now insisting, that, if no apology, it is yet mitigation of the atrocity of the Knapps' conduct in attempting to charge this foul murder on Mr. White, the nephew and principal devisee, that public suspicion was already so directed! As if assassination of character were excusable in proportion as circumstances may render it easy. Their endeavors, when they knew

they were suspected themselves, to fix the charge on others, by foul means and by falsehood, are fair and strong proof of their own guilt. But more of that hereafter.

The counsel say that they might safely admit that Richard Crowninshield, Jr. was the perpetrator of this murder.

But how could they safely admit that? If that were admitted, every thing else would follow. For why should Richard Crowninshield, Jr. kill Mr. White? He was not his heir, nor his devisee; nor was he his enemy. What could be his motive? If Richard Crowninshield, Jr. killed Mr. White, he did it at some one's procurement who himself had a motive. And who, having any motive, is shown to have had any intercourse with Richard Crowninshield, Jr., but Joseph Knapp, and this principally through the agency of the prisoner at the bar? It is the infirmity, the distressing difficulty of the prisoner's case, that his counsel cannot and dare not admit what they yet cannot disprove, and what all must believe. He who believes, on this evidence, that Richard Crowninshield, Jr. was the immediate murderer, cannot doubt that both the Knapps were conspirators in that murder. The counsel, therefore, are wrong, I think, in saying they might safely admit this. The admission of so important and so connected a fact would render it impossible to contend further against the proof of the entire conspiracy, as we state it.

What, then, was this conspiracy? J. J. Knapp, Jr., desirous of destroying the will, and of taking the life of the deceased, hired a ruffian, who, with the aid of other ruffians, was to enter the house, and murder him in his bed.

As far back as January this conspiracy began. Endicott testifies to a conversation with J. J. Knapp at that time, in which Knapp told him that Captain White had made a will, and given the principal part of his property to Stephen White. When asked how he knew, he said, "Black and white don't lie." When asked if the will was not locked up, he said, "There is such a thing as two keys to the same lock." And speaking of the then late illness of Captain White, he said, that Stephen White would not have been sent for if *he* had been there.

Hence it appears, that as early as January Knapp had a knowledge of the will, and that he had access to it by means of false keys. This knowledge of the will, and an intent to

destroy it, appear also from Palmer's testimony, a fact disclosed to him by the other conspirators. He says that he was informed of this by the Crowninshields on the 2d of April. But then it is said that Palmer is not to be credited; that by his own confession he is a felon; that he has been in the State prison in Maine; and, above all, that he was intimately associated with these conspirators themselves. Let us admit these facts. Let us admit him to be as bad as they would represent him to be; still, in law, he is a competent witness. How else are the secret designs of the wicked to be proved, but by their wicked companions, to whom they have disclosed them? The government does not select its witnesses. The conspirators themselves have chosen Palmer. He was the confidant of the prisoners. The fact, however, does not depend on his testimony alone. It is corroborated by other proof; and, taken in connection with the other circumstances, it has strong probability. In regard to the testimony of Palmer, generally, it may be said that it is less contradicted, in all parts of it, either by himself or others, than that of any other material witness, and that every thing he has told is corroborated by other evidence, so far as it is susceptible of confirmation. An attempt has been made to impair his testimony, as to his being at the Half-way House on the night of the murder; you have seen with what success. Mr. Babb is called to contradict him. You have seen how little he knows, and even that not certainly; for he himself is proved to have been in an error by supposing Palmer to have been at the Half-way House on the evening of the 9th of April. At that time he is proved to have been at Dustin's, in Danvers. If, then, Palmer, bad as he is, has disclosed the secrets of the conspiracy, and has told the truth, there is no reason why it should not be believed. Truth is truth, come whence it may.

The facts show that this murder had been long in agitation; that it was not a new proposition on the 2d of April; that it had been contemplated for five or six weeks. Richard Crowninshield was at Wenham in the latter part of March, as testified by Starrett. Frank Knapp was at Danvers in the latter part of February, as testified by Allen. Richard Crowninshield inquired whether Captain Knapp was about home, when at Wenham. The probability is, that they would open the case to Palmer as a new project. There are other circumstances that

show it to have been some weeks in agitation. Palmer's testimony as to the transactions on the 2d of April is corroborated by Allen, and by Osborn's books. He says that Frank Knapp came there in the afternoon, and again in the evening. So the book shows. He says that Captain White had gone out to his farm on that day. So others prove. How could this fact, or these facts, have been known to Palmer, unless Frank Knapp had brought the knowledge? And was it not the special object of this visit to give information of this fact, that they might meet him and execute their purpose on his return from his farm? The letter of Palmer, written at Belfast, bears intrinsic marks of genuineness. It was mailed at Belfast, May 13th. It states facts that he could not have known, unless his testimony be true. This letter was not an afterthought; it is a genuine narrative. In fact, it says, "I know the business your brother Frank was transacting on the 2d of April." How could he have possibly known this, unless he had been there? The "one thousand dollars that was to be paid"; where could he have obtained this knowledge? The testimony of Endicott, of Palmer, and these facts, are to be taken together; and they most clearly show that the death of Captain White was caused by somebody interested in putting an end to his life.

As to the testimony of Leighton, as far as manner of testifying goes, he is a bad witness; but it does not follow from this that he is not to be believed. There are some strange things about him. It is strange, that he should make up a story against Captain Knapp, the person with whom he lived; that he never voluntarily told any thing: all that he has said was screwed out of him. But the story could not have been invented by him; his character for truth is unimpeached; and he intimated to another witness, soon after the murder happened, that he knew something he should not tell. There is not the least contradiction in his testimony, though he gives a poor account of withholding it. He says that he was extremely *bothered* by those who questioned him. In the main story that he relates, he is entirely consistent with himself. Some things are for him, and some against him. Examine the intrinsic probability of what he says. See if some allowance is not to be made for him, on account of his ignorance of things of this kind. It is said to be extraordinary, that he should have heard just so

much of the conversation, and no more; that he should have heard just what was necessary to be proved, and nothing else. Admit that this is extraordinary; still, this does not prove it untrue. It is extraordinary that you twelve gentlemen should be called upon, out of all the men in the county, to decide this case; no one could have foretold this three weeks since. It is extraordinary that the first clew to this conspiracy should have been derived from information given by the father of the prisoner at the bar. And in every case that comes to trial there are many things extraordinary. The murder itself is a most extraordinary one; but still we do not doubt its reality.

It is argued, that this conversation between Joseph and Frank could not have been as Leighton has testified, because they had been together for several hours before; this subject must have been uppermost in their minds, whereas this appears to have been the commencement of their conversation upon it. Now this depends altogether upon the tone and manner of the expression; upon the particular word in the sentence which was emphatically spoken. If he had said, "When did you *see* Dick, Frank?" this would not seem to be the beginning of the conversation. With what emphasis it was uttered, it is not possible to learn; and therefore nothing can be made of this argument. If this boy's testimony stood alone, it should be received with caution. And the same may be said of the testimony of Palmer. But they do not stand alone. They furnish a clew to numerous other circumstances, which, when known, mutually confirm what would have been received with caution without such corroboration. How could Leighton have made up this conversation? "When did you see Dick?" "I saw him this morning." "When is he going to kill the old man?" "I don't know." "Tell him, if he don't do it soon, I won't pay him." Here is a vast amount in few words. Had he wit enough to invent this? There is nothing so powerful as truth; and often nothing so strange. It is not even suggested that the story was made for him. There is nothing so extraordinary in the whole matter, as it would have been for this ignorant country boy to invent this story.

The acts of the parties themselves furnish strong presumption of their guilt. What was done on the receipt of the letter from Maine? This letter was signed by Charles Grant, Jr.,

a person not known to either of the Knapps, nor was it known to them that any other person beside the Crowninshields knew of the conspiracy. This letter, by the accidental omission of the word Jr., fell into the hands of the father, when intended for the son. The father carried it to Wenham where both the sons were. They both read it. Fix your eye steadily on this part of the *circumstantial stuff* which is in the case, and see what can be made of it. This was shown to the two brothers on Saturday, the 15th of May. Neither of them knew Palmer. And if they had known him, they could not have known him to have been the writer of this letter. It was mysterious to them how any one at Belfast could have had knowledge of this affair. Their conscious guilt prevented due circumspection. They did not see the bearing of its publication. They advised their father to carry it to the Committee of Vigilance, and it was so carried. On the Sunday following, Joseph began to think there might be something in it. Perhaps, in the mean time, he had seen one of the Crowninshields. He was apprehensive that they might be suspected; he was anxious to turn attention from their family. What course did he adopt to effect this? He addressed one letter, with a false name, to Mr. White, and another to the committee; and to complete the climax of his folly, he signed the letter addressed to the committee, "Grant," the same name as that which was signed to the letter received from Belfast. It was in the knowledge of the committee, that no person but the Knapps had seen this letter from Belfast; and that no other person knew its signature. It therefore must have been irresistibly plain to them that one of the Knapps was the writer of the letter received by the committee, charging the murder on Mr. White. Add to this the fact of its having been dated at Lynn, and mailed at Salem four days after it was dated, and who could doubt respecting it? Have you ever read or known of folly equal to this? Can you conceive of crime more odious and abominable? Merely to explain the apparent mysteries of the letter from Palmer, they excite the basest suspicions against a man, whom, if they were innocent, they had no reason to believe guilty; and whom, if they were guilty, they most certainly knew to be innocent. Could they have adopted a more direct method of exposing their own infamy? The letter to the committee

has intrinsic marks of a knowledge of this transaction. It tells the *time* and the *manner* in which the murder was committed. Every line speaks the writer's condemnation. In attempting to divert attention from his family, and to charge the guilt upon another, he indelibly fixes it upon himself.

Joseph Knapp requested Allen to put these letters into the post-office, because, said he, "I wish to nip this silly affair in the bud." If this were not the order of an overruling Providence, I should say that it was the silliest piece of folly that was ever practised. Mark the destiny of crime. It is ever obliged to resort to such subterfuges; it trembles in the broad light; it betrays itself in seeking concealment. He alone walks safely who walks uprightly. Who for a moment can read these letters and doubt of Joseph Knapp's guilt? The constitution of nature is made to inform against him. There is no corner dark enough to conceal him. There is no turnpike-road broad enough or smooth enough for a man so guilty to walk in without stumbling. Every step proclaims his secret to every passenger. His own acts come out to fix his guilt. In attempting to charge another with his own crime, he writes his own confession. To do away the effect of Palmer's letter, signed Grant, he writes a letter himself and affixes to it the name of Grant. He writes in a disguised hand; but how could it happen that the same Grant should be in Salem that was at Belfast? This has brought the whole thing out. Evidently he did it, because he has adopted the same style. Evidently he did it, because he speaks of the price of blood, and of other circumstances connected with the murder, that no one but a conspirator could have known.

Palmer says he made a visit to the Crowninshields, on the 9th of April. George then asked him whether he had heard of the murder. Richard inquired whether he had heard the music at Salem. They said that they were suspected, that a committee had been appointed to search houses; and that they had melted up the dagger, the day after the murder, because it would be a suspicious circumstance to have it found in their possession. Now this committee was not appointed, in fact, until Friday evening. But this proves nothing against Palmer; it does not prove that George did not tell him so; it only proves that he gave a false reason for a fact. They had heard that they were

suspected; how could they have heard this, unless it were from the whisperings of their own consciences? Surely this rumor was not then public.

About the 27th of April, another attempt was made by the Knapps to give a direction to public suspicion. They reported themselves to have been robbed, in passing from Salem to Wenham, near Wenham Pond. They came to Salem and stated the particulars of the adventure. They described persons, their dress, size, and appearance, who had been suspected of the murder. They would have it understood that the community was infested by a band of ruffians, and that they themselves were the particular objects of their vengeance. Now this turns out to be all fictitious, all false. Can you conceive of any thing more enormous, any wickedness greater, than the circulation of such reports? than the allegation of crimes, if committed, capital? If no such crime had been committed, then it reacts with double force upon themselves, and goes very far to show their guilt. How did they conduct themselves on this occasion? Did they make hue and cry? Did they give information that they had been assaulted that night at Wenham? No such thing. They rested quietly that night; they waited to be called on for the particulars of their adventure; they made no attempt to arrest the offenders; this was not their object. They were content to fill the thousand mouths of rumor, to spread abroad false reports, to divert the attention of the public from themselves; for they thought every man suspected them, because they knew they ought to be suspected.

The manner in which the compensation for this murder was paid is a circumstance worthy of consideration. By examining the facts and dates, it will satisfactorily appear that Joseph Knapp paid a sum of money to Richard Crowninshield, in five-franc pieces, on the 24th of April. On the 21st of April, Joseph Knapp received five hundred five-franc pieces, as the proceeds of an adventure at sea. The remainder of this species of currency that came home in the vessel was deposited in a bank at Salem. On Saturday, the 24th of April, Frank and Richard rode to Wenham. They were there with Joseph an hour or more, and appeared to be negotiating private business. Richard continued in the chaise; Joseph came to the chaise and conversed with him. These facts are proved by Hart and Leighton, and

by Osborn's books. On Saturday evening, about this time, Richard Crowninshield is proved, by Lummus, to have been at Wenham, with another person whose appearance corresponds with Frank's. Can any one doubt this being the same evening? What had Richard Crowninshield to do at Wenham, with Joseph, unless it were this business? He was there before the murder; he was there after the murder; he was there clandestinely, unwilling to be seen. If it were not upon this business, let it be told what it was for. Joseph Knapp could explain it; Frank Knapp might explain it. But they do not explain it; and the inference is against them.

Immediately after this, Richard passes five-franc pieces; on the same evening, one to Lummus, five to Palmer; and near this time George passes three or four in Salem. Here are nine of these pieces passed by them in four days; this is extraordinary. It is an unusual currency; in ordinary business, few men would pass nine such pieces in the course of a year. If they were not received in this way, why not explain how they came by them? Money was not so flush in their pockets that they could not tell whence it came, if it honestly came there. It is extremely important to them to explain whence this money came, and they would do it if they could. If, then, the price of blood was paid at this time, in the presence and with the knowledge of this defendant, does not this prove him to have been connected with this conspiracy?

Observe, also, the effect on the mind of Richard, of Palmer's being arrested and committed to prison; the various efforts he makes to discover the fact; the lowering, through the crevices of the rock, the pencil and paper for him to write upon; the sending two lines of poetry, with the request that he would return the corresponding lines; the shrill and peculiar whistle; the inimitable exclamations of "Palmer! Palmer! Palmer!" All these things prove how great was his alarm; they corroborate Palmer's story, and tend to establish the conspiracy.

Joseph Knapp had a part to act in this matter. He must have opened the window, and secreted the key; he had free access to every part of the house; he was accustomed to visit there; he went in and out at his pleasure; he could do this without being suspected. He is proved to have been there the Saturday preceding.

If all these things, taken in connection, do not prove that Captain White was murdered in pursuance of a conspiracy, then the case is at an end.

Savary's testimony is wholly unexpected. He was called for a different purpose. When asked who the person was that he saw come out of Captain White's yard between three and four o'clock in the morning, he answered, Frank Knapp. It is not clear that this is not true. There may be many circumstances of importance connected with this, though we believe the murder to have been committed between ten and eleven o'clock. The letter to Dr. Barstow states it to have been done about eleven o'clock; it states it to have been done with a blow on the head, from a weapon loaded with lead. Here is too great a correspondence with the reality not to have some meaning in it. Dr. Peirson was always of the opinion, that the two classes of wounds were made with different instruments, and by different hands. It is possible that one class was inflicted at one time, and the other at another. It is possible that on the last visit the pulse might not have entirely ceased to beat; and then the finishing stroke was given. It is said, that, when the body was discovered, some of the wounds wept, while the others did not. They may have been inflicted from mere wantonness. It was known that Captain White was accustomed to keep specie by him in his chamber; this perhaps may explain the last visit. It is proved, that this defendant was in the habit of retiring to bed, and leaving it afterwards, without the knowledge of his family; perhaps he did so on this occasion. We see no reason to doubt the fact; and it does not shake our belief that the murder was committed early in the night.

What are the probabilities as to the time of the murder? Mr. White was an aged man; he usually retired to bed at about half past nine. He slept soundest in the early part of the night; usually awoke in the middle and latter part; and his habits were perfectly well known. When would persons, with a knowledge of these facts, be most likely to approach him? Most certainly, in the first hour of his sleep. This would be the safest time. If seen then going to or from the house, the appearance would be least suspicious. The earlier hour would then have been most probably selected.

Gentlemen, I shall dwell no longer on the evidence which

tends to prove that there was a conspiracy, and that the prisoner was a conspirator. All the circumstances concur to make out this point. Not only Palmer swears to it, in effect, and Leighton, but Allen mainly supports Palmer, and Osborn's books lend confirmation, so far as possible, from such a source. Palmer is contradicted in nothing, either by any other witness, or any proved circumstance or occurrence. Whatever could be expected to support him does support him. All the evidence clearly manifests, I think, that there was a conspiracy; that it originated with Joseph Knapp; that defendant became a party to it, and was one of its conductors, from first to last. One of the most powerful circumstances is Palmer's letter from Belfast. The amount of this is a direct charge on the Knapps of the authorship of this murder. How did they treat this charge; like honest men, or like guilty men? We have seen how it was treated. Joseph Knapp fabricated letters, charging another person, and caused them to be put into the post-office.

I shall now proceed on the supposition, that it is proved that there was a conspiracy to murder Mr. White, and that the prisoner was party to it.

The second and the material inquiry is, Was the prisoner present at the murder, aiding and abetting therein?

This leads to the legal question in the case. What does the law mean, when it says, that, in order to charge him as a principal, "he must be present aiding and abetting in the murder"?

In the language of the late Chief Justice, "It is not required that the abettor shall be actually upon the spot when the murder is committed, or even in sight of the more immediate perpetrator of the victim, to make him a principal. If he be at a distance, coöperating in the act, by watching to prevent relief, or to give an alarm, or to assist his confederate in escape, having knowledge of the purpose and object of the assassin, this in the eye of the law is being present, aiding and abetting, so as to make him a principal in the murder."

"If he be at a distance coöperating." This is not a distance to be measured by feet or rods; if the intent to lend aid combine with a knowledge that the murder is to be committed, and the person so intending be so situate that he can by any possibility lend this aid in any manner, then he is present in legal contem-

plation. He need not lend any actual aid; to be ready to assist is assisting.

There are two sorts of murder; the distinction between them it is of essential importance to bear in mind: 1. Murder in an affray, or upon sudden and unexpected provocation. 2. Murder secretly, with a deliberate, predetermined intention to commit the crime. Under the first class, the question usually is, whether the offence be murder or manslaughter, in the person who commits the deed. Under the second class, it is often a question whether others than he who actually did the deed were present, aiding and assisting therein. Offences of this kind ordinarily happen when there is nobody present except those who go on the same design. If a riot should happen in the court-house, and one should kill another, this may be murder, or it may not, according to the intention with which it was done; which is always matter of fact, to be collected from the circumstances at the time. But in secret murders, premeditated and determined on, there can be no doubt of the murderous intention; there can be no doubt if a person be present, knowing a murder is to be done, of his concurring in the act. His being there is a proof of his intent to aid and abet; else, why is he there?

It has been contended, that proof must be given that the person accused did actually afford aid, did lend a hand in the murder itself; and without this proof, although he may be near by, he may be presumed to be there for an innocent purpose; he may have crept silently there to hear the news, or from mere curiosity to see what was going on. Preposterous, absurd! Such an idea shocks all common sense. A man is found to be a conspirator to commit a murder; he has planned it; he has assisted in arranging the time, the place, and the means; and he is found in the place, and at the time, and yet it is suggested that he might have been there, not for coöperation and concurrence, but from curiosity! Such an argument deserves no answer. It would be difficult to give it one, in decorous terms. Is it not to be taken for granted, that a man seeks to accomplish his own purposes? When he has planned a murder, and is present at its execution, is he there to forward or to thwart his own design? is he there to assist, or there to prevent? But "Curiosity"! He may be there from mere "curiosity"! Curiosity to witness the success of the execution of his own plan of mur-

der! The very walls of a court-house ought not to stand, the ploughshare should run through the ground it stands on, where such an argument could find toleration.

It is not necessary that the abettor should actually lend a hand, that he should take a part in the act itself; if he be present ready to assist, that is assisting. Some of the doctrines advanced would acquit the defendant, though he had gone to the bedchamber of the deceased, though he had been standing by when the assassin gave the blow. This is the argument we have heard to-day.

The court here said, they did not so understand the argument of the counsel for defendant. Mr. Dexter said, "The intent and power alone must coöperate."

No doubt the law is, that being ready to assist is assisting, if the party has the power to assist, in case of need. It is so stated by Foster, who is a high authority. "If A happeneth to be present at a murder, for instance, and taketh no part in it, nor endeavoreth to prevent it, nor apprehendeth the murderer, nor levyeth hue and cry after him, this strange behavior of his, though highly criminal, will not of itself render him either principal or accessory." "But if a fact amounting to murder should be committed in prosecution of some unlawful purpose, though it were but a bare trespass, to which A in the case last stated had consented, and he had gone in order to give assistance, if need were, for carrying it into execution, this would have amounted to murder in him, and in every person present and joining with him." "If the fact was committed in prosecution of the original purpose which was unlawful, the whole party will be involved in the guilt of him who gave the blow. For in combinations of this kind, the mortal stroke, though given by one of the party, is considered in the eye of the law, and of sound reason too, as given by every individual present and abetting. The person actually giving the stroke is no more than the hand or instrument by which the others strike." The author, in speaking of being present, means actual presence; not actual in opposition to constructive, for the law knows no such distinction. There is but one presence, and this is the situation from which aid, or supposed aid, may be rendered. The law does not say where the person is to go, or how near he is to go, but that he must be where he may give assistance, or where the perpe-

trator may believe that he may be assisted by him. Suppose that he is acquainted with the design of the murderer, and has a knowledge of the time when it is to be carried into effect, and goes out with a view to render assistance, if need be; why, then, even though the murderer does not know of this, the person so going out will be an abettor in the murder.

It is contended that the prisoner at the bar could not be a principal, he being in Brown Street, because he could not there render assistance; and you are called upon to determine this case, according as you may be of opinion whether Brown Street was, or was not, a suitable, convenient, well-chosen place to aid in this murder. This is not the true question. The inquiry is not whether you would have selected this place in preference to all others, or whether you would have selected it at all. If the parties chose it, why should we doubt about it? How do we know the use they intended to make of it, or the kind of aid that he was to afford by being there? The question for you to consider is, Did the defendant go into Brown Street in aid of this murder? Did he go there by agreement, by appointment with the perpetrator? If so, every thing else follows. The main thing, indeed the only thing, is to inquire whether he was in Brown Street by appointment with Richard Crowninshield. It might be to keep general watch; to observe the lights, and advise as to time of access; to meet the murderer on his return, to advise him as to his escape; to examine his clothes, to see if any marks of blood were upon them; to furnish exchange of clothes, or new disguise, if necessary; to tell him through what streets he could safely retreat, or whether he could deposit the club in the place designed; or it might be without any distinct object, but merely to afford that encouragement which would proceed from Richard Crowninshield's consciousness that he was near. It is of no consequence whether, in your opinion, the place was well chosen or not, to afford aid; if it was so chosen, if it was by appointment that he was there, it is enough. Suppose Richard Crowninshield, when applied to to commit the murder, had said, "I won't do it unless there can be some one near by to favor my escape; I won't go unless you will stay in Brown Street." Upon the gentleman's argument, he would not be an aider and abettor in the murder, because the place was not well chosen; though it is apparent that the being in the place chosen

was a condition, without which the murder would never have happened.

You are to consider the defendant as one in the league, in the combination to commit the murder. If he was there by appointment with the perpetrator, he is an abettor. The concurrence of the perpetrator in his being there is proved by the previous evidence of the conspiracy. If Richard Crowninshield, for any purpose whatsoever, made it a condition of the agreement, that Frank Knapp should stand as backer, then Frank Knapp was an aider and abettor; no matter what the aid was, or what sort it was, or degree, be it ever so little; even if it were to judge of the hour when it was best to go, or to see when the lights were extinguished, or to give an alarm if any one approached. Who better calculated to judge of these things than the murderer himself? and if he so determined them, that is sufficient.

Now as to the facts. Frank Knapp knew that the murder was that night to be committed; he was one of the conspirators, he knew the object, he knew the time. He had that day been to Wenham to see Joseph, and probably to Danvers to see Richard Crowninshield, for he kept his motions secret. He had that day hired a horse and chaise of Osborn, and attempted to conceal the purpose for which it was used; he had intentionally left the *place* and the *price* blank on Osborn's books. He went to Wenham by the way of Danvers; he had been told the week before to hasten Dick; he had seen the Crowninshields several times within a few days; he had a saddle-horse the Saturday night before; he had seen Mrs. Beckford at Wenham, and knew she would not return that night. She had not been away before for six weeks, and probably would not soon be again. He had just come from Wenham. Every day, for the week previous, he had visited one or another of these conspirators, save Sunday, and then probably he saw them in town. When he saw Joseph on the 6th, Joseph had prepared the house, and would naturally tell him of it; there were constant communications between them; daily and nightly visitation; too much knowledge of these parties and this transaction, to leave a particle of doubt on the mind of any one, that Frank Knapp knew the murder was to be committed this night. The hour was come, and he knew it; if so, and he was in Brown Street, without explaining why

he was there, can the jury for a moment doubt whether he was there to countenance, aid, or support; or for curiosity alone; or to learn how the wages of sin and death were earned by the perpetrator?

Here Mr. Webster read the law from Hawkins. 1 Hawk. 204, Lib. 1, ch. 32, sec. 7.

The perpetrator would derive courage, and strength, and confidence from the knowledge that one of his associates was near by. If he was in Brown Street, he could have been there for no other purpose. If there for this purpose, then he was, in the language of the law, *present*, aiding and abetting in the murder.

His interest lay in being somewhere else. If he had nothing to do with the murder, no part to act, why not stay at home? Why should he jeopard his own life, if it was not agreed that he should be there? He would not voluntarily go where the very place would cause him to swing if detected. He would not voluntarily assume the place of danger. His [illegible]g this place proves that he went to give aid. His staying away would have made an *alibi*. If he had nothing to do with the murder, he would be at home, where he could prove his *alibi*. He knew he was in danger, because he was guilty of the conspiracy, and, if he had nothing to do, would not expose himself to suspicion or detection.

Did the prisoner at the bar countenance this murder? Did he concur, or did he non-concur, in what the perpetrator was about to do? Would he have tried to shield him? Would he have furnished his cloak for protection? Would he have pointed out a safe way of retreat? As you would answer these questions, so you should answer the general question, whether he was there consenting to the murder, or whether he was there as a spectator only.

One word more on this presence, called constructive presence. What aid is to be rendered? Where is the line to be drawn, between acting, and omitting to act? Suppose he had been in the house, suppose he had followed the perpetrator to the chamber, what could he have done? This was to be a murder by stealth; it was to be a secret assassination. It was not their purpose to have an open combat; they were to approach their

victim unawares, and silently give the fatal blow. But if he had been in the chamber, no one can doubt that he would have been an abettor; because of his presence, and ability to render services, if needed. What service could he have rendered, if there? Could he have helped him to fly? Could he have aided the silence of his movements? Could he have facilitated his retreat, on the first alarm? Surely, this was a case where there was more of safety in going alone than with another; where company would only embarrass. Richard Crowninshield would prefer to go alone. He knew his errand too well. His nerves needed no collateral support. He was not the man to take with him a trembling companion. He would prefer to have his aid at a distance. He would not wish to be encumbered by his presence. He would prefer to have him out of the house. He would prefer that he should be in Brown Street. But whether in the chamber, in the house, in the garden, or in the street, whatsoever is aiding in *actual presence* is aiding in *constructive presence;* any thing that is aid in one case is aid in the other.*

If, then, the aid be anywhere, so as to embolden the perpetrator, to afford him hope or confidence in his enterprise, it is the same as though the person stood at his elbow with his sword drawn. His being there ready to act, with the power to act, is what makes him an abettor.

Here Mr. Webster referred to the cases of Kelly, of Hyde, and others, cited by counsel for the defendant, and showed that they did not militate with the doctrine for which he contended. The difference is, in those cases there was open violence; this was a case of secret assassination. The aid must meet the occasion. Here no *acting* was necessary, but watching, concealment of escape, management.

What are the *facts* in relation to this presence? Frank Knapp is proved to have been a conspirator, proved to have known that the deed was now to be done. Is it not probable that he was in Brown Street to concur in the murder? There were four conspirators. It was natural that some one of them should go with the perpetrator. Richard Crowninshield was to be the perpetrator; he was to give the blow. There is no evidence of any casting of the parts for the others. The defendant would probably be the man to take the second part. He

* 4 Hawk. 201, Lib. 4, ch. 29, sec. 8.

was fond of exploits, he was accustomed to the use of sword-canes and dirks. If any aid was required, he was the man to give it. At least, there is no evidence to the contrary of this.

Aid could not have been received from Joseph Knapp, or from George Crowninshield. Joseph Knapp was at Wenham, and took good care to prove that he was there. George Crowninshield has proved satisfactorily where he was; that he was in other company, such as it was, until eleven o'clock. This narrows the inquiry. This demands of the prisoner to show, if he was not in this place, where he was. It calls on him loudly to show this, and to show it truly. If he could show it, he would do it. If he does not tell, and that truly, it is against him. The defence of an *alibi* is a double-edged sword. He knew that he was in a situation where he might be called upon to account for himself. If he had had no particular appointment or business to attend to, he would have taken care to be able so to account. He would have been out of town, or in some good company. Has he accounted for himself on that night to your satisfaction?

The prisoner has attempted to prove an *alibi*, in two ways. In the first place, by four young men with whom he says he was in company, on the evening of the murder, from seven o'clock till near ten o'clock. This depends upon the certainty of the night. In the second place, by his family, from ten o'clock afterwards. This depends upon the certainty of the time of the night. These two classes of proof have no connection with each other. One may be true, and the other false; or they may both be true, or both be false. I shall examine this testimony with some attention, because, on a former trial, it made more impression on the minds of the court than on my own mind. I think, when carefully sifted and compared, it will be found to have in it more of plausibility than reality.

Mr. Page testifies, that on the evening of the 6th of April he was in company with Burchmore, Balch, and Forrester, and that he met the defendant about seven o'clock, near the Salem Hotel; that he afterwards met him at Remond's, about nine o'clock, and that he was in company with him a considerable part of the evening. This young gentleman is a member of college, and says that he came to town the Saturday evening previous; that he is now able to say that it was the night of

the murder when he walked with Frank Knapp, from the recollection of the fact, that he called himself to an account, on the morning after the murder, as it is natural for men to do when an extraordinary occurrence happens. Gentlemen, this kind of evidence is not satisfactory; general impressions as to time are not to be relied on. If I were called on to state the particular day on which any witness testified in this cause, I could not do it. Every man will notice the same thing in his own mind. There is no one of these young men that could give an account of himself for any *other* day in the month of April. They are made to remember the fact, and then they think they remember the time. The witness has no means of knowing it was Tuesday rather than any other time. He did not know it at first; he could not know it afterwards. He says he called himself to an account. This has no more to do with the murder than with the man in the moon. Such testimony is not worthy to be relied on in any forty-shilling cause. What occasion had he to call himself to an account? Did he suppose that he should be suspected? Had he any intimation of this conspiracy?

Suppose, Gentlemen, you were either of you asked where you were, or what you were doing, on the fifteenth day of June; you could not answer this question without calling to mind some events to make it certain. Just as well may you remember on what you dined each day of the year past. Time is identical. Its subdivisions are all alike. No man knows one day from another, or one hour from another, but by some fact connected with it. Days and hours are not visible to the senses, nor to be apprehended and distinguished by the understanding. The flow of time is known only by something which marks it; and he who speaks of the date of occurrences with nothing to guide his recollection speaks at random, and is not to be relied on. This young gentleman remembers the facts and occurrences; he knows nothing why they should not have happened on the evening of the 6th; but he knows no more. All the rest is evidently conjecture or impression.

Mr. White informs you, that he told him he could not tell what night it was. The first thoughts are all that are valuable in such case. They miss the mark by taking second aim.

Mr. Balch believes, but is not sure, that he was with Frank

Knapp on the evening of the murder. He has given different accounts of the time. He has no means of making it certain. All he knows is, that it was some evening before Fast-day. But whether Monday, Tuesday, or Saturday, he cannot tell.

Mr. Burchmore says, to the best of his belief, it was the evening of the murder. Afterwards he attempts to speak positively, from recollecting that he mentioned the circumstance to William Peirce, as he went to the Mineral Spring on Fast-day. Last Monday morning he told Colonel Putnam he could not fix the time. This witness stands in a much worse plight than either of the others. It is difficult to reconcile all he has said with any belief in the accuracy of his recollections.

Mr. Forrester does not speak with any certainty as to the night; and it is very certain that he told Mr. Loring and others, that he did not know what night it was.

Now, what does the testimony of these four young men amount to? The only circumstance by which they approximate to an identifying of the night is, that three of them say it was cloudy; they think their walk was either on Monday or Tuesday evening, and it is admitted that Monday evening was clear, whence they draw the inference that it must have been Tuesday.

But, fortunately, there is one *fact* disclosed in their testimony that settles the question. Balch says, that on the evening, whenever it was, he saw the prisoner; the prisoner told him he was going out of town on horseback, for a distance of about twenty minutes' drive, and that he was going to get a horse at Osborn's. This was about seven o'clock. At about nine, Balch says he saw the prisoner again, and was then told by him that he had had his ride, and had returned. Now it appears by Osborn's books, that the prisoner had a saddle-horse from his stable, not on Tuesday evening, the night of the murder, but on the Saturday evening previous. This fixes the time about which these young men testify, and is a complete answer and refutation of the attempted *alibi* on Tuesday evening.

I come now to speak of the testimony adduced by the defendant to explain where he was after ten o'clock on the night of the murder. This comes chiefly from members of the family; from his father and brothers.

It is agreed that the affidavit of the prisoner should be received as evidence of what his brother, Samuel H. Knapp, would testify if present. Samuel H. Knapp says, that, about ten minutes past ten o'clock, his brother, Frank Knapp, on his way to bed, opened his chamber door, made some remarks, closed the door, and went to his chamber; and that he did not hear him leave it afterwards. How is this witness able to fix the time at ten minutes past ten? There is no circumstance mentioned by which he fixes it. He had been in bed, probably asleep, and was aroused from his sleep by the opening of the door. Was he in a situation to speak of time with precision? Could he know, under such circumstances, whether it was ten minutes past ten, or ten minutes before eleven, when his brother spoke to him? What would be the natural result in such a case? But we are not left to conjecture this result. We have positive testimony on this point. Mr. Webb tells you that Samuel told him, on the 8th of June, "that he did not know what time his brother Frank came home, and that he was not at home when *he* went to bed." You will consider this testimony of Mr. Webb as indorsed upon this affidavit; and with this indorsement upon it, you will give it its due weight. This statement was made to him after Frank was arrested.

I come to the testimony of the father. I find myself incapable of speaking of him or his testimony with severity. Unfortunate old man! Another Lear, in the conduct of his children; another Lear, I apprehend, in the effect of his distress upon his mind and understanding. He is brought here to testify, under circumstances that disarm severity, and call loudly for sympathy. Though it is impossible not to see that his story cannot be credited, yet I am unable to speak of him otherwise than in sorrow and grief. Unhappy father! he strives to remember, perhaps persuades himself that he does remember, that on the evening of the murder he was himself at home at ten o'clock. He thinks, or seems to think, that his son came in at about five minutes past ten. He fancies that he remembers his conversation; he thinks he spoke of bolting the door; he thinks he asked the time of night; he seems to remember his then going to his bed. Alas! these are but the swimming fancies of an agitated and distressed mind. Alas! they are but the dreams of hope, its uncertain lights, flickering on the thick darkness of parental

distress. Alas! the miserable father knows nothing, in reality, of all these things.

Mr. Shepard says that the first conversation he had with Mr. Knapp was soon after the murder, and *before* the arrest of his sons. Mr. Knapp says it was *after* the arrest of his sons. His own fears led him to say to Mr. Shepard, that his "son Frank was at home that night; and so Phippen told him," or "as Phippen told him." Mr. Shepard says that he was struck with the remark at the time; that it made an unfavorable impression on his mind; he does not tell you what that impression was, but when you connect it with the previous inquiry he had made, whether Frank had continued to associate with the Crowninshields, and recollect that the Crowninshields were then known to be suspected of this crime, can you doubt what this impression was? can you doubt as to the fears he then had?

This poor old man tells you, that he was greatly perplexed at the time; that he found himself in embarrassed circumstances; that on this very night he was engaged in making an assignment of his property to his friend, Mr. Shepard. If ever charity should furnish a mantle for error, it should be here. Imagination cannot picture a more deplorable, distressed condition.

The same general remarks may be applied to his conversation with Mr. Treadwell, as have been made upon that with Mr. Shepard. He told him, that he believed Frank was at home about the usual time. In his conversations with either of these persons, he did not pretend to know, of his own knowledge, the time that he came home. He now tells you positively that he recollects the time, and that he so told Mr. Shepard. He is directly contradicted by both these witnesses, as respectable men as Salem affords.

This idea of an *alibi* is of recent origin. Would Samuel Knapp have gone to sea if it were then thought of? His testimony, if true, was too important to be lost. If there be any truth in this part of the *alibi*, it is so near in point of time that it cannot be relied on. The mere variation of half an hour would avoid it. The mere variations of different time-pieces would explain it.

Has the defendant proved where he was on that night? If you doubt about it, there is an end of it. The burden is upon him to satisfy you beyond all reasonable doubt. Osborn's books,

in connection with what the young men state, are conclusive, I think, on this point. He has not, then, accounted for himself; he has attempted it, and has failed. I pray you to remember, Gentlemen, that this is a case in which the prisoner would, more than any other, be rationally able to account for himself on the night of the murder, if he could do so. He was in the conspiracy, he knew the murder was then to be committed, and if he himself was to have no hand in its actual execution, he would of course, as a matter of safety and precaution, be somewhere else, and be able to prove afterwards that he had been somewhere else. Having this motive to prove himself elsewhere, and the power to do it if he were elsewhere, his failing in such proof must necessarily leave a very strong inference against him.

But, Gentlemen, let us now consider what is the evidence produced on the part of the government to prove that John Francis Knapp, the prisoner at the bar, was in Brown Street on the night of the murder. This is a point of vital importance in this cause. Unless this be made out, beyond reasonable doubt, the law of *presence* does not apply to the case. The government undertake to prove that he was present aiding in the murder, by proving that he was in Brown Street for this purpose. Now, what are the undoubted facts? They are, that two persons were seen in that street, several times during that evening, under suspicious circumstances; under such circumstances as induced those who saw them to watch their movements. Of this there can be no doubt. Mirick saw a man standing at the post opposite his store from fifteen minutes before nine until twenty minutes after, dressed in a full frock-coat, glazed cap, and so forth, in size and general appearance answering to the prisoner at the bar. This person was waiting there; and whenever any one approached him, he moved to and from the corner, as though he would avoid being suspected or recognized. Afterwards, two persons were seen by Webster walking in Howard Street, with a slow, deliberate movement that attracted his attention. This was about half past nine. One of these he took to be the prisoner at the bar, the other he did not know.

About half past ten a person is seen sitting on the ropewalk steps, wrapped in a cloak. He drops his head when passed, to

avoid being known. Shortly after, two persons are seen to meet in this street, without ceremony or salutation, and in a hurried manner to converse for a short time; then to separate, and run off with great speed. Now, on this same night a gentleman is slain, murdered in his bed, his house being entered by stealth from without; and his house situated within three hundred feet of this street. The windows of his chamber were in plain sight from this street; a weapon of death is afterwards found in a place where these persons were seen to pass, in a retired place, around which they had been seen lingering. It is now known that this murder was committed by four persons, conspiring together for this purpose. No account is given who these suspected persons thus seen in Brown Street and its neighborhood were. Now, I ask, Gentlemen, whether you or any man can doubt that this murder was committed by the persons who were thus in and about Brown Street. Can any person doubt that they were there for purposes connected with this murder? If not for this purpose, what were they there for? When there is a cause so near at hand, why wander into conjecture for an explanation? Common sense requires you to take the nearest adequate cause for a known effect. Who were these suspicious persons in Brown Street? There was something extraordinary about them; something noticeable, and noticed at the time; something in their appearance that aroused suspicion. And a man is found the next morning murdered in the near vicinity.

Now, so long as no other account shall be given of those suspicious persons, so long the inference must remain irresistible that they were the murderers. Let it be remembered, that it is already shown that this murder was the result of conspiracy and of concert; let it be remembered, that the house, having been opened from within, was entered by stealth from without. Let it be remembered that Brown Street, where these persons were repeatedly seen under such suspicious circumstances, was a place from which every occupied room in Mr. White's house is clearly seen; let it be remembered, that the place, though thus very near to Mr. White's house, is a retired and lonely place; and let it be remembered that the instrument of death was afterwards found concealed very near the same spot.

Must not every man come to the conclusion, that these per-

sons thus seen in Brown Street were the murderers? Every man's own judgment, I think, must satisfy him that this must be so. It is a plain deduction of common sense. It is a point on which each one of you may reason like a Hale or a Mansfield. The two occurrences explain each other. The murder shows why these persons were thus lurking, at that hour, in Brown Street; and their lurking in Brown Street shows who committed the murder.

If, then, the persons in and about Brown Street were the plotters and executers of the murder of Captain White, we know who they were, and you know that *there* is one of them.

This fearful concatenation of circumstances puts him to an account. He was a conspirator. He had entered into this plan of murder. The murder is committed, and he is known to have been within three minutes' walk of the place. He must account for himself. He has attempted this, and failed. Then, with all these general reasons to show he was actually in Brown Street, and his failures in his *alibi*, let us see what is the direct proof of his being there. But first, let me ask, is it not very remarkable that there is no attempt to show where Richard Crowninshield, Jr. was on that night? We hear nothing of him. He was seen in none of his usual haunts about the town. Yet, if he was the actual perpetrator of the murder, which nobody doubts, he was in the town somewhere. Can you, therefore, entertain a doubt that he was one of the persons seen in Brown Street? And as to the prisoner, you will recollect, that, since the testimony of the young men has failed to show where he was on that evening, the last we hear or know of him, on the day preceding the murder, is, that at four o'clock, P. M., he was at his brother's in Wenham. He had left home, after dinner, in a manner doubtless designed to avoid observation, and had gone to Wenham, probably by way of Danvers. As we hear nothing of him after four o'clock, P. M., for the remainder of the day and evening; as he was one of the conspirators; as Richard Crowninshield, Jr. was another; as Richard Crowninshield, Jr. was in town in the evening, and yet seen in no usual place of resort; the inference is very fair, that Richard Crowninshield, Jr. and the prisoner were together, acting in execution of their conspiracy. Of the four conspirators, J. J. Knapp, Jr. was at Wenham, and George Crowninshield has

been accounted for; so that if the persons seen in Brown Street were the murderers, one of them must have been Richard Crowninshield, Jr., and the other must have been the prisoner at the bar.

Now, as to the proof of his identity with one of the persons seen in Brown Street. Mr. Mirick, a cautious witness, examined the person he saw, closely, in a light night, and says that he thinks the prisoner at the bar is the person; and that he should not hesitate at all, if he were seen in the same dress. His opinion is formed partly from his own observation, and partly from the description of others. But this description turns out to be only in regard to the dress. It is said, that he is now more confident than on the former trial. If he has varied in his testimony, make such allowance as you may think proper. I do not perceive any material variance. He thought him the same person, when he was first brought to court, and as he saw him get out of the chaise. This is one of the cases in which a witness is permitted to give an opinion. This witness is as honest as yourselves, neither willing nor swift; but he says, he believes it was the man. His words are, "This is my opinion"; and this opinion it is proper for him to give. If partly founded on what he has *heard*, then this opinion is not to be taken; but if on what he *saw*, then you can have no better evidence. I lay no stress on similarity of dress. No man will ever lose his life by my voice on such evidence. But then it is proper to notice, that no inferences drawn from any *dissimilarity* of dress can be given in the prisoner's favor; because, in fact, the person seen by Mirick was dressed like the prisoner.

The description of the person seen by Mirick answers to that of the prisoner at the bar. In regard to the supposed discrepancy of statements, before and now, there would be no end to such minute inquiries. It would not be strange if witnesses should vary. I do not think much of slight shades of variation. If I believe the witness is honest, that is enough. If he has expressed himself more strongly now than then, this does not prove him false.

Peter E. Webster saw the prisoner at the bar, as he then thought, and still thinks, walking in Howard Street at half past nine o'clock. He then thought it was Frank Knapp, and has not altered his opinion since. He knew him well; he had long

known him. If he then thought it was he, this goes far to prove it. He observed him the more, as it was unusual to see gentlemen walk there at that hour. It was a retired, lonely street. Now, is there reasonable doubt that Mr. Webster did see him there that night? How can you have more proof than this? He judged by his walk, by his general appearance, by his deportment. We all judge in this manner. If you believe he is right, it goes a great way in this case. But then this person, it is said, had a cloak on, and that he could not, therefore, be the same person that Mirick saw. If we were treating of men that had no occasion to disguise themselves or their conduct, there might be something in this argument. But as it is, there is little in it. It may be presumed that they would change their dress. This would help their disguise. What is easier than to throw off a cloak, and again put it on? Perhaps he was less fearful of being known when alone, than when with the perpetrator.

Mr. Southwick swears all that a man can swear. He has the best means of judging that could be had at the time. He tells you that he left his father's house at half past ten o'clock, and as he passed to his own house in Brown Street, he saw a man sitting on the steps of the ropewalk; that he passed him three times, and each time he held down his head, so that he did not see his face. That the man had on a cloak, which was not wrapped around him, and a glazed cap. That he took the man to be Frank Knapp at the time; that, when he went into his house, he told his wife that he thought it was Frank Knapp; that he knew him well, having known him from a boy. And his wife swears that he did so tell her when he came home. What could mislead this witness at the time? He was not then suspecting Frank Knapp of any thing. He could not then be influenced by any prejudice. If you believe that the witness saw Frank Knapp in this position at this time, it proves the case. Whether you believe it or not depends upon the credit of the witness. He swears it. If true, it is solid evidence. Mrs. Southwick supports her husband. Are they true? Are they worthy of belief? If he deserves the epithets applied to him, then he ought not to be believed. In this fact they cannot be mistaken; they are right, or they are perjured. As to his not speaking to Frank Knapp, that depends upon their intimacy. But a very good reason is, Frank chose to disguise himself.

This makes nothing against his credit. But it is said that he should not be believed. And why? Because, it is said, he himself now tells you, that, when he testified before the grand jury at Ipswich, he did not then say that he thought the person he saw in Brown Street was Frank Knapp, but that "the person was about the size of Selman." The means of attacking him, therefore, come from himself. If he is a false man, why should he tell truths against himself? They rely on his veracity to prove that he is a liar. Before you can come to this conclusion, you will consider whether all the circumstances are now known, that should have a bearing on this point. Suppose that, when he was before the grand jury, he was asked by the attorney this question, "Was the person you saw in Brown Street about the size of Selman?" and he answered, Yes. This was all true. Suppose, also, that he expected to be inquired of further, and no further questions were put to him? Would it not be extremely hard to impute to him perjury for this? It is not uncommon for witnesses to think that they have done all their duty, when they have answered the questions put to them. But suppose that we admit that he did not then tell all he knew, this does not affect the *fact* at all; because he did tell, at the time, in the hearing of others, that the person he saw was Frank Knapp. There is not the slightest suggestion against the veracity or accuracy of Mrs. Southwick. Now she swears positively, that her husband came into the house and told her that he had seen a person on the ropewalk steps, and believed it was Frank Knapp.

It is said that Mr. Southwick is contradicted, also, by Mr. Shillaber. I do not so understand Mr. Shillaber's testimony. I think what they both testify is reconcilable, and consistent. My learned brother said, on a similar occasion, that there is more probability, in such cases, that the persons hearing should misunderstand, than that the person speaking should contradict himself. I think the same remark applicable here.

You have all witnessed the uncertainty of testimony, when witnesses are called to testify what other witnesses said. Several respectable counsellors have been summoned, on this occasion, to give testimony of that sort. They have, every one of them, given different versions. They all took minutes at the time, and without doubt intend to state the truth. But still they

differ. Mr. Shillaber's version is different from every thing that Southwick has stated elsewhere. But little reliance is to be placed on slight variations in testimony, unless they are manifestly intentional. I think that Mr. Shillaber must be satisfied that he did not rightly understand Mr. Southwick. I confess I misunderstood Mr. Shillaber on the former trial, if I now rightly understand him. I, therefore, did not then recall Mr. Southwick to the stand. Mr. Southwick, as I read it, understood Mr. Shillaber as asking him about a person coming out of Newbury Street, and whether, for aught he knew, it might not be Richard Crowninshield, Jr. He answered, that he could not tell. He did not understand Mr. Shillaber as questioning him as to the person whom he saw sitting on the steps of the ropewalk. Southwick, on this trial, having heard Mr. Shillaber, has been recalled to the stand, and states that Mr. Shillaber entirely misunderstood him. This is certainly most probable, because the controlling fact in the case is not controverted; that is, that Southwick did tell his wife, at the very moment he entered his house, that he had seen a person on the ropewalk steps, whom he believed to be Frank Knapp. Nothing can prove with more certainty than this, that Southwick, at the time, *thought* the person whom he thus saw to be the prisoner at the bar.

Mr. Bray is an acknowledged accurate and intelligent witness. He was highly complimented by my brother on the former trial, although he now charges him with varying his testimony. What could be his motive? You will be slow in imputing to him any design of this kind. I deny altogether that there is any contradiction. There may be differences, but not contradiction. These arise from the difference in the questions put; the difference between believing and knowing. On the first trial, he said he did not know the person, and now says the same. Then, we did not do all we had a right to do. We did not ask him who he thought it was. Now, when so asked, he says he believes it was the prisoner at the bar. If he had then been asked this question, he would have given the same answer. That he has expressed himself more strongly, I admit; but he has not contradicted himself. He is more confident now; and that is all. A man may not assert a thing, and still may have no doubt upon it. Cannot every man see this distinction to be consistent? I leave him in that attitude; that only

is the difference. On questions of identity, opinion is evidence. We may ask the witness, either if he knew who the person seen was, or who he thinks he was. And he may well answer, as Captain Bray has answered, that he does not know who it was, but that he thinks it was the prisoner.

We have offered to produce witnesses to prove, that, as soon as Bray saw the prisoner, he pronounced him the same person. We are not at liberty to call them to corroborate our own witness. How, then, could this fact of the prisoner's being in Brown Street be better proved? If ten witnesses had testified to it, it would be no better. Two men, who knew him well, took it to be Frank Knapp, and one of them so said, when there was nothing to mislead them. Two others, who examined him closely, now swear to their opinion that he is the man.

Miss Jaqueth saw three persons pass by the ropewalk, several evenings before the murder. She saw one of them pointing towards Mr. White's house. She noticed that another had something which appeared to be like an instrument of music; that he put it behind him and attempted to conceal it. Who were these persons? This was but a few steps from the place where this apparent instrument of music (of *music* such as Richard Crowninshield, Jr. spoke of to Palmer) was afterwards found. These facts prove this a point of rendezvous for these parties. They show Brown Street to have been the place for consultation and observation; and to this purpose it was well suited.

Mr. Burns's testimony is also important. What was the defendant's object in his private conversation with Burns? He knew that Burns was out that night; that he lived near Brown Street, and that he had probably seen him; and he wished him to say nothing. He said to Burns, "If you saw any of your friends out that night, say nothing about it; my brother Joe and I are your friends." This is plain proof that he wished to say to him, if you saw me in Brown Street that night, say nothing about it.

But it is said that Burns ought not to be believed, because he mistook the color of the dagger, and because he has varied in his description of it. These are slight circumstances, if his general character be good. To my mind they are of no importance. It is for you to make what deduction you may think proper, on

this account, from the weight of his evidence. His conversation with Burns, if Burns is believed, shows two things; first, that he desired Burns not to mention it, if he had seen him on the night of the murder; second, that he wished to fix the charge of murder on Mr. Stephen White. Both of these prove his own guilt.

I think you will be of opinion, that Brown Street was a probable place for the conspirators to assemble, and for an aid to be stationed. If we knew their whole plan, and if we were skilled to judge in such a case, then we could perhaps determine on this point better. But it is a retired place, and still commands a full view of the house; a lonely place, but still a place of observation. Not so lonely that a person would excite suspicion to be seen walking there in an ordinary manner; not so public as to be noticed by many. It is near enough to the scene of action in point of law. It was their point of centrality. The club was found near the spot, in a place provided for it, in a place that had been previously hunted out, in a concerted place of concealment. *Here was their point of rendezvous.* Here might the lights be seen. Here might an aid be secreted. Here was he within call. Here might he be aroused by the sound of the whistle. Here might he carry the weapon. Here might he receive the murderer after the murder.

Then, Gentlemen, the general question occurs, Is it satisfactorily proved, by all these facts and circumstances, that the defendant was in and about Brown Street on the night of the murder? Considering that the murder was effected by a conspiracy; considering that he was one of the four conspirators; considering that two of the conspirators have accounted for themselves on the night of the murder, and were not in Brown Street; considering that the prisoner does not account for himself, nor show where he was; considering that Richard Crowninshield, the other conspirator and the perpetrator, is not accounted for, nor shown to be elsewhere; considering that it is now past all doubt that two persons were seen lurking in and about Brown Street at different times, avoiding observation, and exciting so much suspicion that the neighbors actually watched them; considering that, if these persons thus lurking in Brown Street at that hour were not the murderers, it remains to this day wholly unknown who they were or what their business was; considering the testimony of Miss Jaqueth, and that the club

was afterwards found near this place; considering, finally, that Webster and Southwick saw these persons, and then took one of them for the defendant, and that Southwick then told his wife so, and that Bray and Mirick examined them closely, and now swear to their belief that the prisoner was one of them; it is for you to say, putting these considerations together, whether you believe the prisoner was actually in Brown Street at the time of the murder.

By the counsel for the prisoner, much stress has been laid upon the question, whether Brown Street was a place in which aid could be given, a place in which actual assistance could be rendered in this transaction. This must be mainly decided by their own opinion who selected the place; by what they thought at the time, according to their plan of operation.

If it was agreed that the prisoner should be there to assist, it is enough. If they thought the place proper for their purpose, according to their plan, it is sufficient. Suppose we could prove expressly that they agreed that Frank should be there, and he was there, and you should think it not a well-chosen place for aiding and abetting, must he be acquitted? No! It is not what *I* think or *you* think of the appropriateness of the place; it is what *they* thought *at the time.* If the prisoner was in Brown Street by appointment and agreement with the perpetrator, for the purpose of giving assistance if assistance should be needed, it may safely be presumed that the place was suited to such assistance as it was supposed by the parties might chance to become requisite.

If in Brown Street, was he there by appointment? was he there to aid, if aid were necessary? was he there for, or against, the murderer? to concur, or to oppose? to favor, or to thwart? Did the perpetrator know he was there, there waiting? If so, then it follows that he was there by appointment. He was at the post half an hour; he was waiting for somebody. This proves appointment, arrangement, previous agreement; then it follows that he was there to aid, to encourage, to embolden the perpetrator; and that is enough. If he were in such a situation as to afford aid, or that he was relied upon for aid, then he was aiding and abetting. It is enough that the conspirator desired to have him there. Besides, it may be well said, that he could afford just as much aid there as if he had been in Essex Street, as if he had

been standing even at the gate, or at the window. It was not an act of power against power that was to be done; it was a secret act, to be done by stealth. The aid was to be placed in a position secure from observation. It was important to the security of both that he should be in a lonely place. Now it is obvious that there are many purposes for which he might be in Brown Street.

1. Richard Crowninshield might have been secreted in the garden, and waiting for a signal;
2. Or he might be in Brown Street to advise him as to the time of making his entry into the house;
3. Or to favor his escape;
4. Or to see if the street was clear when he came out;
5. Or to conceal the weapon or the clothes;
6. To be ready for any unforeseen contingency.

Richard Crowninshield lived in Danvers. He would retire by the most secret way. Brown Street is that way. If you find him there, can you doubt why he was there?

If, Gentlemen, the prisoner went into Brown Street, by appointment with the perpetrator, to render aid or encouragement in any of these ways, he was *present*, in legal contemplation, aiding and abetting in this murder. It is not necessary that he should have done any thing; it is enough that he was ready to act, and in a place to act. If his being in Brown Street, by appointment, at the time of the murder, emboldened the purpose and encouraged the heart of the murderer, by the hope of instant aid, if aid should become necessary, then, without doubt, he was present, aiding and abetting, and was a principal in the murder.

I now proceed, Gentlemen, to the consideration of the testimony of Mr. Colman. Although this evidence bears on every material part of the cause, I have purposely avoided every comment on it till the present moment, when I have done with the other evidence in the case. As to the admission of this evidence, there has been a great struggle, and its importance demanded it. The general rule of law is, that confessions are to be received as evidence. They are entitled to great or to little consideration, according to the circumstances under which they are made. Voluntary, deliberate confessions are the most im-

portant and satisfactory evidence, but confessions hastily made, or improperly obtained, are entitled to little or no consideration. It is always to be inquired, whether they were purely voluntary, or were made under any undue influence of hope or fear; for, in general, if any influence were exerted on the mind of the person confessing, such confessions are not to be submitted to a jury.

Who is Mr. Colman? He is an intelligent, accurate, and cautious witness; a gentleman of high and well-known character, and of unquestionable veracity; as a clergyman, highly respectable; as a man, of fair name and fame.

Why was Mr. Colman with the prisoner? Joseph J. Knapp was his parishioner; he was the head of a family, and had been married by Mr. Colman. The interests of that family were dear to him. He felt for their afflictions, and was anxious to alleviate their sufferings. He went from the purest and best of motives to visit Joseph Knapp. He came to save, not to destroy; to rescue, not to take away life. In this family, he thought there might be a chance to save one. It is a misconstruction of Mr. Colman's motives, at once the most strange and the most uncharitable, a perversion of all just views of his conduct and intentions the most unaccountable, to represent him as acting, on this occasion, in hostility to any one, or as desirous of injuring or endangering any one. He has stated his own motives, and his own conduct, in a manner to command universal belief and universal respect. For intelligence, for consistency, for accuracy, for caution, for candor, never did witness acquit himself better, or stand fairer. In all that he did as a man, and all he has said as a witness, he has shown himself worthy of entire regard.

Now, Gentlemen, very important confessions made by the prisoner are sworn to by Mr. Colman. They were made in the prisoner's cell, where Mr. Colman had gone with the prisoner's brother, N. Phippen Knapp. Whatever conversation took place was in the presence of N. P. Knapp. Now, on the part of the prisoner, two things are asserted; first, that such inducements were suggested to the prisoner, in this interview that no confessions made by him ought to be received; second, that, in point of fact, he made no such confessions as Mr. Colman testifies to, nor, indeed, any confessions at all. These two prop-

ositions are attempted to be supported by the testimony of N. P. Knapp. These two witnesses, Mr. Colman and N. P. Knapp, differ entirely. There is no possibility of reconciling them. No charity can cover both. One or the other has sworn falsely. If N. P. Knapp be believed, Mr. Colman's testimony must be wholly disregarded. It is, then, a question of credit, a question of belief between the two witnesses. As you decide between these, so you will decide on all this part of the case.

Mr. Colman has given you a plain narrative, a consistent account, and has uniformly stated the same things. He is not contradicted, except by the testimony of Phippen Knapp. He is influenced, as far as we can see, by no bias, or prejudice, any more than other men, except so far as his character is now at stake. He has feelings on this point, doubtless, and ought to have. If what he has stated be not true, I cannot see any ground for his escape. If he be a true man, he must have heard what he testifies. No treachery of memory brings to memory things that never took place. There is no reconciling his evidence with good intention, if the facts are not as he states them. He is on trial as to his veracity.

The relation in which the other witness stands deserves your careful consideration. He is a member of the family. He has the lives of two brothers depending, as he may think, on the effect of his evidence; depending on every word he speaks. I hope he has not another responsibility resting upon him. By the advice of a friend, and that friend Mr. Colman, J. Knapp made a full and free confession, and obtained a promise of pardon. He has since, as you know, probably by the advice of other friends, retracted that confession, and rejected the offered pardon. Events will show who of these friends and advisers advised him best, and befriended him most. In the mean time, if this brother, the witness, be one of these advisers, and advised the retraction he has, most emphatically, the lives of his brothers resting upon his evidence and upon his conduct. Compare the situation of these two witnesses. Do you not see mighty motive enough on the one side, and want of all motive on the other? I would gladly find an apology for that witness, in his agonized feelings, in his distressed situation; in the agitation of that hour, or of this. I would gladly impute it to error, or to want of recollection, to confusion of mind, or disturbance

of feeling. I would gladly impute to any pardonable source that which cannot be reconciled to facts and to truth; but, even in a case calling for so much sympathy, justice must yet prevail, and we must come to the conclusion, however reluctantly, which that demands from us.

It is said, Phippen Knapp was probably correct, because he knew he should probably be called as a witness. Witness to what? When he says there was no confession, what could he expect to bear witness of? But I do not put it on the ground that he did not hear; I am compelled to put it on the other ground, that he did hear, and does not now truly tell what he heard.

If Mr. Colman were out of the case, there are other reasons why the story of Phippen Knapp should not be believed. It has in it inherent improbabilities. It is unnatural, and inconsistent with the accompanying circumstances. He tells you that they went "to the cell of Frank, to see if he had any objection to taking a trial, and suffering his brother to accept the offer of pardon"; in other words, to obtain Frank's consent to Joseph's making a confession; and in case this consent was not obtained, that the pardon would be offered to Frank. Did they bandy about the chance of life, between these two, in this way? Did Mr. Colman, after having given this pledge to Joseph, and after having received a disclosure from Joseph, go to the cell of Frank for such a purpose as this? It is impossible; it cannot be so.

Again, we know that Mr. Colman found the club the next day; that he went directly to the place of deposit, and found it at the first attempt, exactly where he says he had been informed it was. Now Phippen Knapp says, that Frank had stated nothing respecting the club; that it was not mentioned in that conversation. He says, also, that he was present in the cell of Joseph all the time that Mr. Colman was there; that he believes he heard all that was said in Joseph's cell; and that he did not himself know where the club was, and never had known where it was, until he heard it stated in court. Now it is certain that Mr Colman says he did not learn the particular place of deposit of the club from Joseph; that he only learned from him that it was deposited under the steps of the Howard Street meeting-house, without defining the particular steps. It is certain, also, that he had more knowledge of the position of the

club than this; else how could he have placed his hand on it so readily? and where else could he have obtained this knowledge, except from Frank?

Here Mr. Dexter said that Mr. Colman had had other interviews with Joseph, and might have derived the information from him at previous visits. Mr. Webster replied, that Mr. Colman had testified that he learned nothing in relation to the club until this visit. Mr. Dexter denied there being any such testimony. Mr. Colman's evidence was read, from the notes of the judges, and several other persons, and Mr. Webster then proceeded.

My point is to show that Phippen Knapp's story is not true, is not consistent with itself; that, taking it for granted, as he says, that he heard all that was said to Mr. Colman in both cells, by Joseph and by Frank; and that Joseph did not state particularly where the club was deposited; and that he knew as much about the place of deposit of the club as Mr. Colman knew; why, then Mr. Colman must either have been miraculously informed respecting the club, or Phippen Knapp has not told you the whole truth. There is no reconciling this, without supposing that Mr. Colman has misrepresented what took place in Joseph's cell, as well as what took place in Frank's cell.

Again, Phippen Knapp is directly contradicted by Mr. Wheatland. Mr. Wheatland tells the same story, as coming from Phippen Knapp, that Colman now tells. Here there are two against one. Phippen Knapp says that Frank made no confessions, and that he said he had none to make. In this he is contradicted by Wheatland. He, Phippen Knapp, told Wheatland, that Mr. Colman did ask Frank some questions, and that Frank answered them. He told him also what these answers were. Wheatland does not recollect the questions or answers, but recollects his reply; which was, "Is not this *premature?* I think this answer is sufficient to make Frank a principal." Here Phippen Knapp opposes himself to Wheatland, as well as to Mr. Colman. Do you believe Phippen Knapp against these two respectable witnesses, or them against him?

Is not Mr. Colman's testimony credible, natural, and proper? To judge of this, you must go back to that scene.

The murder had been committed; the two Knapps were now arrested; four persons were already in jail supposed to be

concerned in it, the Crowninshields, and Selman, and Chase. Another person at the Eastward was supposed to be in the plot; it was important to learn the facts. To do this, some one of those suspected must be admitted to turn state's witness. The contest was, Who should have this privilege? It was understood that it was about to be offered to Palmer, then in Maine; there was no good reason why he should have the preference. Mr. Colman felt interested for the family of the Knapps, and particularly for Joseph. He was a young man who had hitherto maintained a fair standing in society; he was a husband. Mr. Colman was particularly intimate with his family. With these views he went to the prison. He believed that he might safely converse with the prisoner, because he thought confessions made to a clergyman were sacred, and that he could not be called upon to disclose them. He went, the first time, in the morning, and was requested to come again. He went again at three o'clock; and was requested to call again at five o'clock. In the mean time he saw the father and Phippen, and they wished he would not go again, because it would be said the prisoners were making confession. He said he had engaged to go again at five o'clock; but would not, if Phippen would excuse him to Joseph. Phippen engaged to do this, and to meet him at his office at five o'clock. Mr. Colman went to the office at the time, and waited; but, as Phippen was not there, he walked down street, and saw him coming from the jail. He met him, and while in conversation, near the church, he saw Mrs. Beckford and Mrs. Knapp going in a chaise towards the jail. He hastened to meet them, as he thought it not proper for them to go in at that time. While conversing with them near the jail, he received two distinct messages from Joseph, that he wished to see him. He thought it proper to go; and accordingly went to Joseph's cell, and it was while there that the disclosures were made. Before Joseph had finished his statement, Phippen came to the door; he was soon after admitted. A short interval ensued, and they went together to the cell of Frank. Mr. Colman went in by invitation of Phippen; he had come directly from the cell of Joseph, where he had for the first time learned the incidents of the tragedy. He was incredulous as to some of the facts which he had learned, they were so different from his previous impressions. He was desirous of knowing whether

he could place confidence in what Joseph had told him. He, therefore, put the questions to Frank, as he has testified before you; in answer to which Frank Knapp informed him, —

1. "That the murder took place between ten and eleven o'clock."

2. "That Richard Crowninshield was alone in the house."

3. "That he, Frank Knapp, went home afterwards."

4. "That the club was deposited under the steps of the Howard Street meeting-house, and under the part nearest the burying-ground, in a rat hole."

5. "That the dagger or daggers had been worked up at the factory."

It is said that these five answers just fit the case; that they are just what was wanted, and neither more nor less. True, they are; but the reason is, because truth always fits. Truth is always congruous, and agrees with itself; every truth in the universe agrees with every other truth in the universe; whereas falsehoods not only disagree with truths, but usually quarrel among themselves. Surely Mr. Colman is influenced by no bias, no prejudice; he has no feelings to warp him, except, now that he is contradicted, he may feel an interest to be believed.

If you believe Mr. Colman, then the evidence is fairly in the case.

I shall now proceed on the ground that you do believe Mr. Colman.

When told that Joseph had determined to confess, the defendant said, "It is hard, or unfair, that Joseph should have the benefit of confessing, since the thing was done for his benefit." What thing was done for his benefit? Does not this carry an implication of the guilt of the defendant? Does it not show that he had a knowledge of the object and history of the murder?

The defendant said, "I told Joseph, when he proposed it, that it was a silly business, and would get us into trouble." He knew, then, what this business was; he knew that Joseph proposed it, and that he agreed to it, else he could not get *us* into trouble; he understood its bearing and its consequences. Thus much was said, under circumstances that make it clearly evidence against him, before there is any pretence of an inducement held out. And does not this prove him to have had a knowledge of the conspiracy?

He knew the daggers had been destroyed, and he knew who committed the murder. How could he have innocently known these facts? Why, if by Richard's story, this shows him guilty of a knowledge of the murder, and of the conspiracy. More than all, he knew when the deed was done, and that he went home afterwards. This shows his participation in that deed. "Went home afterwards!" Home, from what scene? home, from what fact? home, from what transaction? home, from what place? This confirms the supposition that the prisoner was in Brown Street for the purposes ascribed to him. These questions were directly put, and directly answered. He does not intimate that he received the information from another. Now, if he knows the time, and went home afterwards, and does not excuse himself, is not this an admission that he had a hand in this murder? Already proved to be a conspirator in the murder, he now confesses that he knew who did it, at what time it was done, that he was himself out of his own house at the time, and went home afterwards. Is not this conclusive, if not explained? Then comes the club. He told where it was. This is like possession of stolen goods. He is charged with the guilty knowledge of this concealment. He must show, not say, how he came by this knowledge. If a man be found with stolen goods, he must prove how he came by them. The place of deposit of the club was premeditated and selected, and he knew where it was.

Joseph Knapp was an accessory, and an accessory only; he knew only what was told him. But the prisoner knew the particular spot in which the club might be found. This shows his knowledge something more than that of an accessory. This presumption must be rebutted by evidence, or it stands strong against him. He has too much knowledge of this transaction to have come innocently by it. It must stand against him until he explains it.

This testimony of Mr. Colman is represented as new matter, and therefore an attempt has been made to excite a prejudice against it. It is not so. How little is there in it, after all, that did not appear from other sources? It is mainly confirmatory. Compare what you learn from this confession with what you before knew.

As to its being proposed by Joseph, was not that known?

As to Richard's being alone in the house, was not that known?
As to the daggers, was not that known?
As to the time of the murder, was not that known?
As to his being out that night, was not that known?
As to his returning afterwards, was not that known?
As to the club, was not that known?

So this information confirms what was known before, and fully confirms it.

One word as to the interview between Mr. Colman and Phippen Knapp on the turnpike. It is said that Mr. Colman's conduct in this matter is inconsistent with his testimony. There does not appear to me to be any inconsistency. He tells you that his object was to save Joseph, and to hurt no one, and least of all the prisoner at the bar. He had probably told Mr. White the substance of what he heard at the prison. He had probably told him that Frank confirmed what Joseph had confessed. He was unwilling to be the instrument of harm to Frank. He therefore, at the request of Phippen Knapp, wrote a note to Mr. White, requesting him to consider Joseph as authority for the information he had received. He tells you that this is the only thing he has to regret; as it may seem to be an evasion, as he doubts whether it was entirely correct. If it was an evasion, if it was a deviation, if it was an error, it was an error of mercy, an error of kindness; an error that proves he had no hostility to the prisoner at the bar. It does not in the least vary his testimony, or affect its correctness. Gentlemen, I look on the evidence of Mr. Colman as highly important; not as bringing into the cause new facts, but as confirming, in a very satisfactory manner, other evidence. It is incredible that he can be false, and that he is seeking the prisoner's life through false swearing. If he is true, it is incredible that the prisoner can be innocent.

Gentlemen, I have gone through with the evidence in this case, and have endeavored to state it plainly and fairly before you. I think there are conclusions to be drawn from it, the accuracy of which you cannot doubt. I think you cannot doubt that there was a conspiracy formed for the purpose of committing this murder, and who the conspirators were:

That you cannot doubt that the Crowninshields and the Knapps were the parties in this conspiracy:

That you cannot doubt that the prisoner at the bar knew that the murder was to be done on the night of the 6th of April:

That you cannot doubt that the murderers of Captain White were the suspicious persons seen in and about Brown Street on that night:

That you cannot doubt that Richard Crowninshield was the perpetrator of that crime:

That you cannot doubt that the prisoner at the bar was in Brown Street on that night.

If there, then it must be by agreement, to countenance, to aid the perpetrator. And if so, then he is guilty as PRINCIPAL.

Gentlemen, your whole concern should be to do your duty, and leave consequences to take care of themselves. You will receive the law from the court. Your verdict, it is true, may endanger the prisoner's life, but then it is to save other lives. If the prisoner's guilt has been shown and proved beyond all reasonable doubt, you will convict him. If such reasonable doubts of guilt still remain, you will acquit him. You are the judges of the whole case. You owe a duty to the public, as well as to the prisoner at the bar. You cannot presume to be wiser than the law. Your duty is a plain, straight-forward one. Doubtless we would all judge him in mercy. Towards him, as an individual, the law inculcates no hostility; but towards him, if proved to be a murderer, the law, and the oaths you have taken, and public justice, demand that you do your duty.

With consciences satisfied with the discharge of duty, no consequences can harm you. There is no evil that we cannot either face or fly from, but the consciousness of duty disregarded. A sense of duty pursues us ever. It is omnipresent, like the Deity. If we take to ourselves the wings of the morning, and dwell in the uttermost parts of the sea, duty performed, or duty violated, is still with us, for our happiness or our misery. If we say the darkness shall cover us, in the darkness as in the light our obligations are yet with us. We cannot escape their power, nor fly from their presence. They are with us in this life, will be with us at its close; and in that scene of inconceivable solemnity, which lies yet farther onward, we shall still find ourselves surrounded by the consciousness of duty, to pain us wherever it has been violated, and to console us so far as God may have given us grace to perform it.

The Bank of the United States against William D. Primrose*

THE case of The Bank of the United States against William D. Primrose was brought up by appeal from the Circuit Court of Alabama, together with the cases of The Bank of Augusta against Joseph B. Earle, and The New Orleans and Carrollton Railroad Company also against Joseph B. Earle. The same principle was at issue in the three cases.

The facts in the case of The Bank of the United States against William D. Primrose were as follows.

"The Bank of The United States, incorporated by the legislature of the State of Pennsylvania, as the holders of a bill of exchange, protested for non-payment, for five thousand three hundred and fifty dollars, drawn by Charles Gascoigne, at Mobile, on the 14th of January, 1837, at four months, on J. and C. Gascoigne of New York, in favor of William D. Primrose, and by him indorsed, instituted, in October, 1837, an action against the indorser of the bill, in the Circuit Court of the Southern District of Alabama. The agreed facts of the case which were submitted to the Circuit Court were as follows.

"The plaintiffs are a body corporate existing under and by virtue of a law of the State of Pennsylvania, authorized by its charter to sue and be sued by the name of the President, Directors, and Company of the Bank of the United States, and to deal in bills of exchange; and composed of citizens of Pennsylvania, and of States of the United States other than the State of Alabama. The defendant is a citizen of the State of Alabama. George Poe, Jr. was the agent of the plaintiffs, resident in Mobile, and in the possession of funds belonging to the plaintiffs, intrusted to him for the sole purpose of purchasing bills of exchange. The said George Poe, Jr., as such agent, on the 14th day of January, 1837, purchased at Mobile the bill declared upon, and paid for the same in notes of the branch of the Bank of the State of Alabama at

* An argument made in the Supreme Court of the United States, on the 9th of February, 1839.

Mobile. The defendant is the payee of the bill, and indorsed it to plaintiffs, the present holders. The bill was presented at maturity to the acceptors, and duly protested for non-payment, and due and legal notice given to the defendant.

"The question for the opinion of the court on the foregoing statement of facts is, whether the purchase of the said bill of exchange by the plaintiffs as aforesaid was a valid contract under the laws of Alabama. If the court be of opinion that the said contract was valid, and that the said plaintiffs, as holders of the said bill, acquired the legal title thereto by the said purchase, then judgment to be rendered for the plaintiffs for the sum of five thousand three hundred and fifty dollars, with interest at eight per cent. since the 30th of May, 1837, and ten per cent. damages. But if the court be of opinion that the said purchase was prohibited by the laws of Alabama, and the contract was therefore invalid and void, judgment is to be rendered for the defendant.

"The Circuit Court of Alabama gave judgment for the defendant."

The cause was transferred by writ of error to the Supreme Court of the United States, and was tried in connection with the two others above named, in which the same question was raised.

The case of The Bank of the United States against Primrose was argued by Mr. Sergeant and Mr. Webster for the plaintiffs in error. The cause was one of high importance, covering a vast variety of contracts entered into in the several States of the Union by the agents of corporations established in other States. It was calledat the time the "Great Appeal Case from Alabama."

The opinion of the Supreme Court of the United States, reversing the decision of the court below, was delivered by Chief Justice Taney, Mr. Justice Baldwin concurring in the judgment of the court, for reasons stated in an opinion of his own, and Mr. Justice McKinley dissenting.

Mr. Webster's argument was as follows.

THE record presents this case.

The Bank of the United States is a corporation created by a law of the State of Pennsylvania. By that act the bank, among other functions, possesses that of dealing in bills of exchange. In the month of January, 1837, having funds in Mobile, this bank, through the instrumentality of its agent, Mr. Poe, purchased a bill of exchange to remit to New York. This bill, drawn at Mobile upon New York, and indorsed by William D. Primrose, the defendant in this case, not having been paid either at New York or by the drawer, the Bank of the United States instituted this suit in the Circuit Court of Alabama, to recover the money due on the bill.

In the court below, it was decided that the contract by Poe in behalf of the bank was void, on two grounds: First, because it was a contract made by the Bank of the United States, in the State of Alabama; whereas a bank incorporated by the State of Pennsylvania can do no act out of the limits of Pennsylvania. Secondly, because Alabama has a bank of her own, the capital of which is owned by the State herself, which is authorized to buy and sell exchange, and from the profits of which she derives her revenue; and the purchase of bills of exchange being a banking operation, the purchase of such bills by others, at least by any corporation, although there is no express law forbidding it, is against the policy of the State of Alabama, as it may be inferred from the provisions of the constitution of that State, and the law made in conformity thereto.

It is admitted that the parties are rightfully in court. It is admitted, also, that the defendant is a citizen of Alabama, and that all the citizens who compose the corporation of the Bank of the United States are citizens of the State of Pennsylvania, or of some other State than Alabama. The question is, Can they, as a corporation, do any act within the State of Alabama? In other words, is there any thing in the constitution or laws of the State of Alabama which prohibits, or rightfully can prohibit, citizens of other States, or corporations created by other States, from buying and selling bills of exchange in the State of Alabama?

In his argument, yesterday, for the defendant in this case, my learned friend* asked certain questions which I propose to answer.

Can this bank, said he, transfer itself into the State of Alabama? Certainly not. Can it establish a branch in the State of Alabama, there to perform the same duties, and transact the same business, in all respects, as in the State of Pennsylvania? Certainly not. Can it exercise in the State of Alabama *any* of its corporate functions? Certainly it can. For my learned friend admits its right to sue in that State, which is a right that it possesses solely by the authority of the Pennsylvania law by which the bank is incorporated.

We thus clear the case of some difficulty by arriving at this

* Mr. Vande Gruff.

point, the admission on both sides that there are certain powers which the bank can exercise within the State of Alabama, and certain others which it cannot exercise.

The question is, then, whether the bank can exercise, within the State of Alabama, this very power of buying a bill of exchange.

Our proposition is, that she can buy a bill of exchange within the State of Alabama; because there are no corporate functions necessary to the act of buying a bill of exchange; because buying and selling exchange is a thing open to all the world, in Alabama as well as everywhere else; because, although the power to buy and sell bills of exchange be conferred upon this bank by its charter, and it could not buy or sell a bill of exchange without that provision in its charter, yet this power was conferred upon it, as were other powers conferred by its charter, to place the bank upon the same footing as an individual; to give it, not a monopoly, not an exclusive privilege, in this respect, but simply the same power which the members of the corporation, as individuals, have an unquestionable right to exercise. The banker, the broker, the merchant, the manufacturer, all buy bills of exchange as individuals; the individuals who compose a corporation may do it; and we say that they may do it, though they do it in the name of, and for, the corporation. We say, undoubtedly, that they cannot acquire power, under the Pennsylvania charter, to do acts in Alabama which they cannot do as individuals; but we say that the corporation may do, in their corporate character, in Alabama, all such acts, authorized by their charter, as the members thereof would have a right to perform as individuals.

The learned counsel on the other side was certainly not disposed to concede, gratuitously, any thing in this case. Yet he did admit that there might be a case in which the acts of a corporation created by one State, done in another State, would be valid. He supposed the case of a railroad company in one State sending an agent into another State to buy iron for the construction of the road. Without conceding expressly the point of law in that case, he admitted that it would be a case very different from the present; and he gave as a reason for this admission, that it would be a single special act, necessary to enable the corporation to execute its functions within the State to

which it belonged, and in this respect differing from the case now under consideration. In what circumstance, it may well be asked, do the cases differ? One act only of the corporation of the Bank of the United States is set forth in this record, and that act stands singly and by itself. There is no proof before the court, that the corporation ever bought another bill of exchange than that which is the subject of this suit. Transactions of this nature must necessarily come one by one before this court, when they come at all, and must stand or fall on their individual merits, and not upon the supposition of any policy which would recognize the legality of a single act, and deny the validity of the dealings or transactions generally, of which that act is a part.

Then, as to the other reason stated by my learned friend in support of the idea that such a purchase of iron might be admitted, he says it is because that, in that case, the purchase, being made abroad solely to enable the corporation to perform its functions at home, might be considered legal, under the law of comity of one State toward another.

Now, that supposed case is precisely the case before the court. Here is the case of a corporation established in Philadelphia, one of whose lawful functions is to deal in exchange. A Philadelphia merchant, having complied with the order of his correspondent in Alabama, draws a bill upon him for the amount due in consequence, goes to the Bank of the United States, and sells the bill. The funds thus realized by the bank from the purchase of bills of exchange accumulate in Alabama. How are those funds to be brought back by the Philadelphia corporation within its control? The bank has unquestioned power to deal in bills of exchange. Can there be such a thing as dealing in *exchange*, with a power to act only at one end of the line? Certainly not. How, then, is the bank in Philadelphia to get its funds back from Alabama? Suppose that it were to send an agent there and buy specie. Can the bank ship the specie? Can it sign an agreement for the freight, insurance, and charges of bringing it round? To do that would be an act of commerce, of navigation, not of exchange. A power conferred upon a bank to deal in exchange would be perfectly nugatory, unless accompanied by a power also to direct its funds to be remitted. The practical result of a con-

trary construction would be, that this Pennsylvania bank may carry on exchange between Philadelphia and Reading, or Philadelphia and Lancaster, but not by possibility with Mobile, or any other city or place in the South, or even with New York, Trenton, or Baltimore. Out of Pennsylvania it could only buy and remit. It could get no return. An exchange that runs but one way! What sort of an *exchange* is that?

Having cleared the case of some of these generalities, Mr. Webster proceeded to the exposition of what he considered a constitutional, American view of the question.

The record of this case finds that these plaintiffs, the members of the corporation of the Bank of the United States, are citizens of other States, and that the defendant is a citizen of Alabama. Now, in the first place, (to begin at the beginning of this part of the question,) what are the relations which the individual citizens of one State bear to the individual citizens of any other State of this Union?

How did the matter stand before the Revolution? When these States were Colonies, what was the relation between the inhabitants of the different Colonies? Certainly it was not one of aliens. They were not, indeed, all citizens of the same Colony; but certainly they were fellow-subjects, and owed a common allegiance; and it was not competent for the legislative power to say that the citizens of any one of the Colonies should be alien to the others. This was the state of the case until the 4th of July, 1776, when this common allegiance was thrown off. After a short interval of two years, and the renunciation of that allegiance, the Articles of Confederation were adopted; and now let us see what was the relation between the citizens of the different States by those articles. The government had become a confederation. But it was something more, much more. It was not merely an alliance between distinct governments for the common defence and general welfare, but it recognized and confirmed a community of interest, of character, and of privileges, between the citizens of the several States. "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union," said the fourth of the Articles of Confederation, "the free inhabitants of each of these States shall be entitled to all the privileges and immunities of free citizens in the several

States; and the people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce." This placed the inhabitants of each State on equal ground as to the rights and privileges which they might exercise in every other State.

So things stood at the adoption of the Constitution of the United States. The article of the present Constitution, in fewer words and more general and comprehensive terms, confirms this community of rights and privileges in the following form: "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." However obvious and general this provision may be, it will be found to have some particular application to the case now before the court; the article in the Confederation serving as the expounder of this article in the Constitution.

That this article in the Constitution does not confer on the citizens of each State political rights in every other State is admitted. A citizen of Pennsylvania cannot go into Virginia and vote at an election in that State; though when he has acquired a residence in Virginia, and is otherwise qualified as required by her constitution, he becomes, without formal adoption as a citizen of Virginia, a citizen of that State politically. But for the purposes of trade, commerce, buying and selling, it is evidently not in the power of any State to impose any hinderance or embarrassment, or lay any excise, toll, duty, or exclusion, upon citizens of other States, or to place them, coming there, upon a different footing from her own citizens. There is one provision, then, in the Constitution, by which citizens of one State may trade in another without hinderance or embarrassment.

There is another provision of the Constitution, by which citizens of one State are entitled to sue citizens of any other State in the courts of the United States. This is a very plain and clear right under the Constitution; but it is not more clear than the preceding.

Here, then, are two distinct constitutional provisions conferring power upon citizens of Pennsylvania and every other State, as to what they may do in Alabama or any other State. Citizens of other States may *trade* in Alabama, in whatsoever is lawful to citizens of Alabama; and if, in the course of their dealings, they have claims on citizens of Alabama, they may *sue* in

Alabama in the courts of the United States. This is American constitutional law, independent of all comity whatever.

By the decisions of this court, it has been settled that this right to sue is a right which may be exercised in the name of a corporation. Here is one of the rights, then, which may be exercised in Alabama by citizens of another State in the name of a corporation. If citizens of Pennsylvania can exercise in Alabama the right to sue, in the name of a corporation, what hinders them from exercising in the same manner this other constitutional right, the right to trade? If it be the established right of persons in Pennsylvania to sue in Alabama, in the name of a corporation, why may they not do any other lawful act in the name of a corporation? If no reason to the contrary can be given, then the law in the one case is the law also in the other case.

My learned friend says, indeed, that suing and making a contract are different things. True; but this argument, so far as it has any force, makes against his cause; for it is a much more distinct exercise of corporate power to bring a suit, than to make a purchase by an agent. What does the law take to be true, when it says that a corporation of one State may sue in another? Why, that the corporation is there, in court, ready to submit to the court's decree, a party on its record. But in the case of the purchase of the bill of exchange which is the subject of this suit, what is assumed? No more than that George Poe bought a bill of exchange, and paid the value for it on account of his employers in Philadelphia. So far from its being a more natural right for a corporation to be allowed to sue, it is a more natural right to be allowed to trade, in a State in which the corporation does not exist. What is the distinction? Buying a bill of exchange is said to be an act, and therefore the corporation could not do it in Alabama. Is not a suit an act? Is it not doing? Does it not, in truth, involve many acts?

The truth is, that this argument against the power of a corporation to do acts beyond the territorial jurisdiction of the authority by which it is created, is refuted by all history as well as by plain reason.

What have all the great corporations in England been doing for centuries back? The English East India Company, as far back as the reign of Elizabeth, has been trading all over the

Eastern world. That company traded in Asia before Great Britain had established any territorial government there, and in other parts of the world where England never pretended to any territorial authority. The Bank of England, established in 1694, has been always trading and dealing in exchanges and bullion with Hamburg, Amsterdam, and other marts of Europe. Numerous other corporations have been created in England for the purpose of exercising power over matters and things in territories wherein the power of England has never been exerted. The whole commercial world is full of such corporations, exercising similar powers beyond the territorial jurisdiction within which they have legal existence.

I say, then, that the right secured to the people of Pennsylvania, to sue in any other State in the name of a corporation, is no more clear than this other right of such a corporation to trade in any other State; nor even so clear. It is a more violent legal presumption, or a much greater extent of national courtesy or comity, to suppose a foreign corporation actually in court, in its legal existence, with its legal attributes, and acting in its own name, than it is to allow an ordinary act of trade, done by its agent, on its own account, to be a valid transaction.

There is an opinion of this court directly bearing on this question. It was in the case of the Bank of the United States *v.* Deveaux, decided in 1809. The bank here mentioned was the first Bank of the United States, which had not, like the last, express authority given in its charter to sue in the courts of the United States. It sued, therefore, as this plaintiff sues, in its name as a corporation; but with an averment, as here, that its members were citizens of Pennsylvania, the action being brought against a citizen of Georgia. The only question was, whether the plaintiffs might not exercise their constitutional right to sue in the courts of the United States, although they appeared in the name of their Pennsylvania corporation; and the court decided that they might. "Substantially and essentially," said Chief Justice Marshall, "the parties in such a case, where the members of the corporation are aliens, or citizens of a different State from the opposite party, come within the spirit and terms of the jurisdiction conferred by the Constitution on the national tribunals. . . . . That corporations composed of citizens are considered by the legislature as citizens, under certain

circumstances, is to be strongly inferred from the registering acts. It never could be intended that an American registered vessel, abandoned to an insurance company composed of citizens, should lose her character as an American vessel; and yet this would be the consequence of declaring that the members of the corporation were, to every intent and purpose, out of view, and merged in the corporation."

The argument here is, that citizens of a State may exercise their rights of suing, as such citizens, in the name of their corporation; because in such a name the law recognizes them as competent to engage in transactions, hold property, and enjoy rights proper for them as citizens.

If the court concur in this language of its own opinion as far back as the year 1809, it must be admitted that the rights of the people of Pennsylvania, as citizens of the United States, are not merged in the act of incorporation by which they are associated, and under which they are parties to this suit. If there ever was a human being that did not argue to the obscure from the more obscure, it was certainly the late Chief Justice of the United States. And what is his argument to prove that the citizens of one State may sue in another by a corporate name? It is, as I have said, that they may sue by a corporate name, because they can do acts out of court by a corporate name; whilst, directly reversing this conclusion, it has been held in this case, in the court below, that, whilst a corporation of one State may rightfully sue in another State, it cannot do any other act therein.

In this view of the case, I see no occasion to call to our aid the law of comity or international courtesy. Here our case stands, independently of that law, on American ground, as an American question.

Now, as to the reason of the case. What possible difference can it make, if these citizens of Pennsylvania can trade, or buy and sell bills in Alabama, whether the trading, or buying and selling, be under one agency or another? That Poe (the agent of the Bank of the United States at Mobile) could, under a power of attorney from a citizen of Philadelphia, buy and sell bills of exchange in Alabama, will not be denied. If, without an act of incorporation, several citizens of Philadelphia should form an association to buy and sell bills of exchange, with five

directors or managers of its concerns, those five directors may send as many agents as they please into other States to buy bills of exchange, and transact other business of this description. Having thus formed themselves into this associated company, and appointed agents for the purpose of transacting their business, if they should go one step further, and obtain a charter from Pennsylvania, that their meetings and proceedings may be more regular, and the acts of the association more methodical, what would be the difference, in the eye of reason, between the acts of the members of such a corporation, and the acts of the same individuals associated for the same purposes without incorporation, and acting by common agents, correspondents, or attorneys? The officers of a bank are but the agents of the proprietors; and their purchases and sales are founded upon their property, and directed by their will, in the same manner as the acts of agents of unincorporated associations or partnerships. The Girard Bank, we all know, was never incorporated until after Mr. Girard's death; yet its proprietor, during a considerable part of his life, and until his death, acted as a banker. Could he not, during his life, send an agent into Alabama, and there purchase bills of exchange? And if his neighbors over the way chose to ask for an act of incorporation from the State of Pennsylvania, are they thereby any less entitled to the privileges common to all other citizens than Stephen Girard was?

I agree, certainly, in general, that a State law cannot operate ex-territorially, as the phrase is. But it is a rule of law, that a State authority may create an artificial being, giving it legal existence; and that that being, thus created, may legally sue in other States than that by which it is created. It follows, of course, as a consequence of the right of suit in another State, that it may obtain judgment there. If it obtain judgment, it may accept satisfaction of that judgment. If a judgment be obtained in Alabama by the Bank of the United States, would not an acknowledgment of satisfaction by an agent of the bank be a satisfaction of the decree of the court? How is the fruit of a suit to be gathered, if the bank, by its agent, cannot do this act? What benefit can it be to this bank to be allowed to sue in Alabama, if it cannot take the money sued for? But it is said by the court below, that it cannot recover money in Alabama, because it cannot do an act there! According to this

argument, although the power to appeal to law and the power to recover judgment exist, yet the *fructus legis* is all dust and ashes.

On the commercial branch of this question I shall say but little. But thus much I will say. The State of Alabama cannot make any commercial regulation for her own emolument or benefit such as shall create any difference between her own citizens and citizens of other States. I do not say that the State of Alabama may not make corporations, and give to them privileges which she does not give to her citizens. But I do say, that she cannot create a monopoly to the prejudice of citizens of other States, or to the disparagement or prejudice of any common commercial right. Suppose that a person having occasion to purchase bills of exchange should not like the credit of bills sold by the Bank of Alabama; or suppose (what is within the reach of possibility) that the Bank of Alabama should fail; may not a citizen buy bills elsewhere? Or is it supposed that the State of Alabama can give such a preference to any institution of her own in the buying and selling of exchange, that no exchange can be bought and sold within her limits but by that institution? It would be, doubtless, doing the State great injustice to suppose that she could entertain any such purpose.

In conclusion of the argument upon this point, I maintain that the plaintiffs in this case had a right to purchase this bill, and to recover judgment upon it. For the same reason that they had a right to bring this suit, they had the right to do the act upon which the suit was brought.

But if the rights of the plaintiffs, under this constitutional view of the case, be doubted, then what has been called the comity of nations obliges the court to sustain the plaintiffs in this cause.

The term "comity" is taken from the civil law. Vattel has no distinct chapter upon that head. But the doctrine is laid down by other authorities with sufficient distinctness, and in effect by him. It is, in general terms, that there are, between nations at peace with one another, rights, both national and individual, resulting from the comity or courtesy due from one friendly nation to another. Among these is the right to sue in their courts

respectively; the right to travel in each other's dominions; the right to pursue one's vocation in trade; the right to do all things, generally, which belong to the citizens proper of each country, and which they are not precluded from doing by some positive law of the state. Among these rights, one of the clearest is the right of a citizen of one nation to take away his property from the territory of any other friendly nation, without molestation or objection. This is what we call the comity of nations. It is the usage of nations, and has become a positive obligation on all nations. I know that it is but customary or voluntary law; that it is a law existing by the common understanding and consent of nations, and not established for the government of nations by any common superior. For this reason, every nation, to a certain extent, judges for itself of the extent of the obligation of this law, and puts its own construction upon it. Every other nation, however, has a right to do the same; and if, therefore, any two nations differ irreconcilably in their construction of this law, there is no resort for settling that difference but the *ultima ratio regum*.

The right of a foreigner to sue in the courts of any country may be regulated by particular laws or ordinances of that country. He may be required to give security for the costs of suit in any case, or not to leave the country until the end of the controversy. He may possibly be required to give security that he will not carry his property out of the country till his debts are paid. But if, under pretence of such regulation, any nation shall impose unreasonable restrictions or penalties on the citizens of any other nation, the power of judging that matter for itself lies with that other nation. Suppose that the government of the United States, for example, should say that every foreigner should pay into the public treasury ten, twenty, or fifty per cent. of any amount which he might recover by suit in our courts of law, would such a regulation be perfectly just and right? Or would not the practice of such extortion upon the citizens of other nations be a just ground of complaint; and, if unredressed, a ground of war much more reasonable than most of the causes which put nations in arms against one another? What is, in fact, now the question which has assumed so serious an aspect between the governments of France and Mexico? One of the leading causes of difference between the two coun-

tries, so far as I understand it, is, not that the courts of Mexico are not open to the citizens or subjects of France, but that the courts do not do justice between them and the citizens of Mexico; in other words, that French subjects are not treated in Mexico according to the comity of the law of nations. I do not speak of the merits of this quarrel. Into that question I do not enter; I speak only of things alleged between the parties. Look into Vattel, and you will find that this very right to carry away property, the proceeds of trade, from a foreign friendly country, *by exchange*, is a well-understood and positive principle of the law of nations. Suppose that there existed no treaties between the United States and France or England guarantying these rights to each other's citizens, these rights would yet exist by tacit consent and permission. Suppose this government, in the absence of treaties, were to shut its courts against the citizens of either nation, (to do so would be only a violation of the comity of nations,) and should grant them no redress upon complaint being made, it would, unquestionably, be ground of war against the United States by that nation.

There are in London several incorporated insurance companies. Suppose a ship, insured by one of these companies, should be wrecked in the Chesapeake Bay. Being abandoned, she became the property of the corporation by which she was insured. I demand whether the insurers may not come and take this property, and bring an action for it, if necessary, in any court in this country, State or Federal. They may recover by an action of tort against the wrongdoer. They may replevy their property, if necessary, or sell it, or refit it, or send it back. Unquestionably, if any country were to debar the citizens of another country from the enjoyment of these common rights within its territorial jurisdiction, it would be cause of war. I do not mean that a single act of that sort would or should bring on a war; but it would be an act of that nature, so plain and manifest a violation of our duty, under the law of nations, as to justify war. According to the judgment of the court below, in the present case, however, these insurance companies would be deprived of their rightful remedy. You let them sue, indeed; but that is all.

I may here refer to a case tried some time ago in the Circuit Court of the Massachusetts District, in which I was of counsel.

A vessel insured in Boston was wrecked in Nova Scotia, and was abandoned to the insurers. The insurance office sent out an agent, who did that which the owner of the vessel said was an acceptance of the abandonment. On the question whether the agent of the Boston office accepted the abandonment, the court decided the case. If we had said that we sent him down, indeed, but that his agency ceased when he got to the boundary line of the State, and he could do no act when he got beyond it, and the court had agreed with us, we might, perhaps, have gained our cause. But it never occurred to me, nor probably to the court, that the functions of our agent ended the moment that he passed the limits of the State.

The law of comity is a part of the law of nations; and it authorizes a corporation of any State to make contracts beyond the limits of that State.

How does *a State* contract? How many of the States of this Union have made contracts for loans in England! A State is sovereign, in a certain sense. But when a State sues, it sues as a corporation. When it enters into contracts with the citizens of foreign nations, it does so in its corporate character. I now say, that it is the adjudged and admitted law of the world, that corporations have the same right to contract and to sue in foreign countries that individuals have. By the law of nations, individuals of other countries are allowed in this country to contract and sue; and we make no distinction, in the case of individuals, between the right to sue and the right to contract. Nor can any such distinction be sustained in law in the case of corporations. Where, in history, in the books, is any law or *dictum* to be found, (except the disputed case from Virginia,) in which a distinction is drawn between the rights of individuals and of corporations to contract and sue in foreign countries in regard to things generally free and open to every body? In the whole civilized world, at home and abroad, in England, Holland, and other countries of Europe, the equal rights of corporations and individuals, in this respect, have been undisputed until now, and in this case; and if a distinction is to be set up between them at this day, it lies with the counsel on the other side to produce some semblance of authority or show of reason for it.

But it is argued, that, though this law of comity exists as be-

tween independent nations, it does not exist between the States of this Union. That argument appears to have been the foundation of the judgment in the court below.

In respect to this law of comity, it is said, States are not nations; they have no national sovereignty; a sort of *residuum* of sovereignty is all that remains to them. The national sovereignty, it is said, is conferred on this government, and part of the *municipal* sovereignty. The rest of the municipal sovereignty belongs to the States. Notwithstanding the respect which I entertain for the learned judge who presided in that court, I cannot follow in the train of his argument. I can make no diagram, such as this, of the partition of national character between the State and the general governments. I cannot map it out, and say, "So far is national, and so far municipal; and here is the exact line where the one begins and the other ends." We have no second Laplace, and we never shall have, with his *Mécanique Politique*, able to define and describe the orbit of each sphere in our political system with such exact mathematical precision. There is no such thing as arranging these governments of ours by the laws of gravitation, so that they will be sure to go on for ever without impinging. These institutions are practical, admirable, glorious, blessed creations. Still they were, when created, experimental institutions; and if the convention which framed the Constitution of the United States had set down in it certain general definitions of power, such as have been alleged in the argument of this case, and stopped there, I verily believe that, in the course of the fifty years which have since elapsed, this government would have never gone into operation.

Suppose that this Constitution had said, in terms, after the language of the court below, "All national sovereignty shall belong to the United States; all municipal sovereignty to the several States." I will say that, however clear, however distinct, such a definition may appear to those who use it, the employment of it in the Constitution could only have led to utter confusion and uncertainty. I am not prepared to say that the States have no national sovereignty. The laws of some of the States, Maryland and Virginia, for instance, provide punishment for treason. The power thus exercised is certainly not municipal. Virginia has a law of alienage; that is, a power ex-

ercised against a foreign nation. Does not the question necessarily arise, when a power is exercised concerning an alien enemy, "Enemy to whom?" The law of escheat, which exists in many States, is also the exercise of a great sovereign power.

The term "sovereignty" does not occur in the Constitution at all. The Constitution treats States as States, and the United States as the United States; and, by a careful enumeration, declares all the powers that are granted to the United States, and all the rest are reserved to the States. If we pursue to the extreme point the powers granted and the powers reserved, the powers of the general and State governments will be found, it is to be feared, impinging and in conflict. Our hope is, that the prudence and patriotism of the States, and the wisdom of this government, will prevent that catastrophe. For myself, I will pursue the advice of the court in Deveaux's case; I will avoid nice metaphysical subtilties, and all useless theories; I will keep my feet out of the traps of general definition; I will keep my feet out of all traps; I will keep to things as they are, and go no farther to inquire what they might be, if they were not what they are. The States of this Union, as States, are subject to all the voluntary and customary law of nations.*

If, for the decision of any question, the proper rule is to be found in the law of nations, that law adheres to the subject. It follows the subject through, no matter into what place, high or low. You cannot escape the law of nations in a case where it is applicable. The air of every judicature is full of it. It pervades the courts of law of the highest character, and the court of *pie poudre;* ay, even the constable's court. It is part of the universal law. It may share the glorious eulogy pronounced by Hooker upon law itself, that there is nothing so high as to be beyond the reach of its power, nothing so low as to be beneath its care. If any question be within the influence of the law of nations, the law of nations is there. If the law of comity does not exist between the States of this Union, how can it exist between a State and the subjects of any foreign sovereignty?

Upon all the consideration that I have given to the case, the

* Vattel, p. 61.

conclusion seems to me inevitable, that, if the law of comity do not exist between the States of this Union, it cannot exist between the States individually and foreign powers. It is true, a State cannot make a treaty; she cannot be a party to a new chapter on the law of nations; but the law which prevails among nations, the customary rule of judicature recognized by all nations, binds her in all her courts.

I have heard no answer to another argument. If a contract be made in New York, with the expectation that it is to be there executed, and suit is brought upon it in Alabama, it is to be decided by the law of the State in which the contract was made. In a case now before this court, there has been a decision by the court of Alabama, in which that court has undertaken to learn the law of the State of New York, and administer it in Alabama. Why take notice in Alabama of the law of New York? Simply because there are cases in which the courts in Alabama feel it to be their duty to administer that law, and to enforce rights accordingly. That is the very point for which we contend; namely, the court in Alabama should have given effect to rights exercised in that State by the plaintiff in the present cause, under the authority of Pennsylvania, without prejudice to the State of Alabama.

After all that has been said in argument about corporations, they are but forms of special partnership, in some of which the partners are severally liable. The whole end and aim of most of them, as with us, is to concentrate the means of small capitalists in a form in which they can be used to advantage.

In the Eastern States, manufactures too extensive for individual capital are carried on in this way. A large quantity of goods is manufactured and sold to the South, out of cotton bought in the South, to the amount of many millions in every year. Upon the principle of the decision in the court below, the manufacturers of the goods and the growers of the cotton would be equally precluded from recovering their dues. What will our fellow-citizens of the South say to this? If, after we have got their cotton, they cannot get their money for it, they will be in no great love, I think, with these new doctrines about the comity of States and nations.

Again, look at the question as it regards the insurance offices. How are all marine insurances, fire insurances, and life insur-

ances effected in this country, but by the agency of companies incorporated by the several States? And the insurances made by these companies beyond the limits of their particular States, are they all void? I suppose that the insurances against fire effected for companies at Hartford, in Connecticut, alone, by agents all over the Northern States, may amount to an aggregate of some millions of dollars. I remember a case occurring in New Hampshire, of a suit against one of those companies for the amount of an insurance, in which a recovery was had against the company, and nothing was said, nor probably thought, of such a contract of insurance being illegal, on the ground that a corporation of Connecticut could not do an act or make a contract in New Hampshire. Are those insurances all to be held void, upon the principle of the decision from Alabama?

And as to notes issued by banks; if one in Alabama hold the notes of a bank incorporated by Pennsylvania, are they void? If one be robbed there of such notes, is it no theft? If one counterfeit those notes there, is it no crime? Are all such notes mere nullities, when out of the State where issued?

Reference has been made to statute-books to show cases in which the States have forbidden foreign insurance companies from making insurances within their limits. But no such prohibition has been shown against insurances by citizens of, or companies created in, the different States. Is not this an exact case for the application of the rule, *Exceptio probat regulam?* The fact of such prohibitory legislation shows that citizens of other States have, and that citizens of foreign powers had, before they were excluded by law, the *right* to make insurances in any and every one of the States.

I will next call the attention of the court to the deposit law, passed by Congress on the 23d of June, 1836. It is one of the conditions upon which, under that act, any State bank might become a depository of the public money, that it should enter into obligations "to render to the government all the duties and services heretofore required by law to be performed by the late Bank of the United States, and its several branches or offices": that is, to remit money to any part of the United States, transfer it from one State to another, and perform other financial services of this kind. But that act required, also, something more;

and it shows how little versed we in Congress were (and I take to myself my full share of the shame) in the legal obstacles to the doing of acts in one State by corporations of other States. The first section of that act provides, that, "in those States, Territories, or Districts, in which there are no banks," the Secretary of the Treasury "may make arrangement with a bank or banks in some other State, Territory, or District, to establish an agency or agencies in the States, Territories, or Districts so destitute of banks, as banks of deposit." Here is an express recognition by Congress of the power of a State bank to create an agent for the purpose of dealing as a bank in another State or Territory.

It has been said, that, as there is no obligation of comity, under the law of nations, between the States, it remains for the legislatures of the several States to adopt, in their conduct towards each other, as much of the principle of comity as they please. Here, then, there is to be negotiation between the States to determine how far they will observe this law of comity. They are thus required to do precisely what they cannot do. States cannot make treaties nor compacts. A State cannot negotiate. It cannot even hold an Indian talk! And now, I would ask how it happens, at this time of the day, that this court is called upon to make a decision contrary to the spirit of the Constitution, and against the whole course of decisions in this country and in Europe, and the undisputed practice under this government for fifty years, overturning the law of comity, and leaving it to the States each to establish *a comity of nations for itself.*

I shall now take leave of the question of the power of a corporation created by one of the States to make contracts in another, and proceed to consider whether there be any thing in the laws or constitution of the State of Alabama which prevents the agent of the Bank of the United States in that State from making such a contract as that which is the foundation of this suit.

It is said that the buying of a bill of exchange by such agent is contrary to the policy of the State of Alabama; and this is inferred from the law establishing the Bank of Alabama; that bank being authorized to deal in bills of exchange, and the

constitution of the State authorizing the establishment of no more than one bank in the State.

This, however, is a violent inference from the premises. How does the buying or selling bills of exchange in Alabama, by another purchaser than the Bank of Alabama, infringe her policy? Because, it is said, it diminishes the profits which she derives from the dealings of the bank. Profit is her policy, it is argued; gain, her end. Is it against her policy for Mr. Biddle to buy bills, because his bank is incorporated; and not against her policy for Mr. Girard to buy bills, because his is not incorporated? Or how far does she carry this policy imputed to her? Is no one to be allowed to buy or sell bills of exchange in Alabama but a bank of her own, which may or may not be in credit, and may or may not be solvent? It would be strange indeed, were any State in this Union to adopt such a policy as this. But if the argument founded on this inferred policy of Alabama amounts to any thing, it proves, not that incorporated citizens of other States cannot buy or sell bills there, but that it is the policy of Alabama to prevent other citizens from buying bills at all in Alabama.

I think that there is no just foundation for the inference of any such policy on the part of the State of Alabama. By referring to Aikin's Digest of the laws of that State, it will be found that she has carried her policy but little further than merely establishing a bank. Her public officers are authorized to receive the notes of banks of other States in payment of dues to her; and she has enacted laws to punish the forgery of notes of other banks. Now, taking her acts together, considering them as a whole, the inference which has been drawn from her establishment of a State bank under her constitution is certainly not sustained.

To consider this argument, however, more closely. It is assumed by it, first, that the State meant, by her legislation, to take to herself all the profits of banking within her territorial limits; and secondly, that the act of buying and selling a bill of exchange belongs to banking.

The profits of banking are derived more from circulation than from exchange. If the State meant, through her bank policy, to take all the *profits* of banking, why has she not taken all the profits of circulation? Not only she has done no such

thing, but she protects the circulation of the notes of banks of other States.

I now beg to ask the particular attention of the court to this question: WHAT IS BANKING?

Alabama, in reference to banking, has done nothing but establish a bank, and give it the usual banking powers. And when the learned counsel on the other side speak of *banking*, what do they mean by it? A bank deals in exchange, and it buys or builds houses also; so do individuals. If there be any thing peculiar in these acts by a bank, it must be, not in the nature of the acts individually, but in the aggregate of the whole. What constitutes banking must be something peculiar. There are various acts of legislation by different States in this country, for granting or preventing the exercise of banking privileges. But has any law ever been passed to authorize or to prevent the buying by an individual of a bill of exchange? No one has ever heard of such a thing. The laws to restrain banking have all been directed to one end; that is, to repress the unauthorized circulation of paper money. There are various other functions performed by banks; but, in discharging all these, they only do what unincorporated individuals do.

What is that, then, without which any institution is not a bank, and with which it is a bank? It is a power to issue promissory notes with a view to their circulation as money.

Our ideas of banking have been derived principally from the act constituting the first Bank of the United States, the organization and powers of which were imitated from the Bank of England.*

The project of the Bank of England was conceived by Mr. Paterson, a Scotch gentleman, who had travelled much abroad, and had seen somewhere (I believe in Lombardy) a small bank which issued tickets or promises of payment of money. From this he took the idea of a bank of circulation. That was in 1694. At that time, neither inland bills nor promissory notes were negotiable or transferable, so as to enable the holder to bring suit thereon in his own name. There was no negotiable paper,

* To ascertain the character and peculiar functions of the Bank of England, Mr. Webster here referred, and referred the court, to various authorities; to McCulloch's Commercial Dictionary; to Smollett's Continuation of Hume's England; to Godfrey's History of the Bank of England, in Lord Somers's Tracts, Vol. XI. art. 1; to Anderson's History of Commerce, and some other authorities.

except foreign bills of exchange. Mr. Paterson's conception was, that the notes of the Bank of England should be negotiable *toties quoties*, or transferable from hand to hand, payable at the bank in specie, either on demand, or at very short sight. This conception had complete success, because there was then no other inland paper, either bills or notes, which was negotiable. The whole field was occupied by Bank of England notes.

In 1698, inland bills were made negotiable by act of Parliament; and in the fourth year of Queen Anne's reign, promissory notes were made negotiable. Of course, after this, every body might issue promissory notes; and where they had credit enough, these might circulate as money. There is not much of novelty in the inventions of mankind. Under this state of things, that took place in England which we have seen so often take place among us, and which we have put to the account of modern contrivance. Large companies were formed, with heavy amounts of capital, for purposes not professedly banking; one, especially, to carry on the mining business on a large scale. These companies issued promissory notes, payable on demand, and these notes readily got into circulation as cash, to the prejudice of the circulation of the Bank of England. But, Parliament being at this time in great want of ready money for the expenditures of the war on the Continent, the bank proposed to double its capital, and to lend this new half of it to government, if the government would secure to the bank an exclusive circulation of its notes. The statute of the 6th of Anne, chapter 22, was accordingly passed; which recites that other persons and divers corporations have presumed to borrow money, and to deal as a bank, contrary to former acts; and thereupon it is enacted, that "no corporation, or more than six persons in partnership, shall borrow, owe, or take up any money on their bills and notes, payable at demand, or at less than six months from the borrowing." This provision has been often reënacted, and constitutes the *banking privilege* of the Bank of England. Competition was not feared from the circulation of individual notes. Hence individuals, or partnerships of not more than six persons, have been at liberty to issue small notes, payable on demand; in other words, notes for circulation. And we know that, in the country, such notes have extensively circulated; but private

bankers in London, in the neighborhood of the bank, though it was lawful, have not found it useful to issue their own notes. The banking privilege of the Bank of England accordingly consisted simply in the privilege of issuing notes for circulation, while that privilege was forbidden by law to all other corporations and all large partnerships and associations.

This privilege was restrained in 1826, so as not to prohibit banking companies except within the distance of sixty-five miles of London; and, at the same time, notes of the bank were made a tender in payment of all debts, except by the bank itself. This provision may be considered as a new privilege; but it does not belong to the original and essential idea of banking. Mr. McCulloch remarks, and truly, that all that government has properly to do with banks is only so far as they are banks of issue. Upon the same principle, the banks of other countries of Europe are incorporated, with the privilege to issue and circulate notes as their distinctive character.*

Now, how is it in our own country? When our State legislatures have undertaken to restrain banking, the great end in view has been to prevent the circulation of notes. I may on this point refer to the statute-books of Massachusetts, Maine, Rhode Island, and New Hampshire, for restraining unauthorized companies from issuing notes of circulation. Not unlike is the statute of Ohio, imposing a punishment for unauthorized banking. Her law defines, in the first place, what constitutes a bank, namely, the issuing of notes which pass by delivery, and which are intended for circulation as cash. That is the true definition of a bank, as we understand it in this country. I would also refer to the laws of other States, Maryland, New Jersey, Missouri, Pennsylvania, Delaware, North Carolina, South Carolina, Virginia, Georgia, all to the same effect. The law of the State of Alabama herself is much more important, in this view of the case, than that of any other State. The constitution of the State of Alabama was established in 1819; the law creating the Bank of Alabama was passed in 1823. The constitution and this law are all the authorities from which the inference has been drawn as to the policy of the State of Alabama. Did she suppose that, by this law, she

* Here Mr. Webster explained the character of the banks of France, Belgium, and some other countries.

was establishing such a monopoly of the purchase of bills of exchange as has been contended for in this case? Certainly not. For, by a law passed afterwards, she restrained the circulation of unauthorized bank-notes; that is, notes not issued by *some* authorized bank. But did she also restrain dealings in exchange? She did no such thing. Nor is there any thing either in the constitution or the laws of the State of Alabama which shows that by banking she ever meant more than the circulation of bills as currency. There is nothing, therefore, in any law or any policy of Alabama against the purchase of bills of exchange by others as well as by the Bank of Alabama. She has prohibited by law other transactions, which are clearly banking transactions; but she has not touched this. If even her banking policy includes as well buying exchange as circulation, and she guards against competition in the one and leaves the other open, who can say, in the face of such evidence, that it is her policy to guard against what she leaves free and unrestrained?

Is there any thing in the constitution, or any ground in the legislation of Alabama, to sustain the allegation which has been made of her policy? If not, is the existence of such a policy to be established here by construction, and that construction far-fetched?

And here I rest my argument on this case, which has been discussed by others so ably, as not to justify my occupying the time of the court by going further into it.

The learned counsel on the other side, in the course of his argument of yesterday, alluded to the newspapers, which, he said, had treated the decision of the court below scornfully. I was sorry to hear it; for the learned judge has acted, in his decision, I have no doubt, under a high sense of duty. I have been told, but I have not seen it, that a press in this city, since this case has been under consideration in this court, has undertaken to speak, in a tone somewhat approaching to that of command, of the decision upon it to be expected from this court. Such conduct is certainly highly discreditable to the character of the country, as well as disrespectful and injurious to the court.

A learned gentleman on the other side said, the other day,

that he thought he might regard himself, in this cause, as having the country for his client. He only meant, doubtless, to express a strong opinion, that the welfare of the country required the case to be decided in his favor. I agree with the learned gentleman, and I go, indeed, far beyond him in my estimate of the importance of this case to the country. He did not take pains to show the extent of the evil which would result from undoing the vast number of contracts which would be affected by the affirmation here of the judgment rendered in the court below, because his object did not require that; his object was to diminish the prospect of mischief, not to enlarge it. For myself, I see neither limit nor end to the calamitous consequences of such a decision. I do not know where it would not reach, what interests it would not disturb, or how any part of the commercial system of the country would be free from its influences, direct or remote. And for what end is all this to be done? What practical evil calls for so harsh, not to say so rash, a remedy? And why now, when existing systems and established opinions, when both the law and the public sentiment, have concurred in what has been found, practically, so safe and so useful; why now, and why here, seek to introduce new and portentous doctrines? If I were called upon to say what has struck me as most remarkable and wonderful in this whole case, I would, instead of indulging in expletives, exaggerations, or exclamations, put it down as the most extraordinary circumstance, that now, within a short month of the expiration of the first half-century of our existence under this Constitution, such a question should be made; that now, for the first time, and here, the last place on earth where they might be expected, such doctrines as have been heard in its support should be brought forward. With all the respect which I really entertain for the court below, and for the arguments which have been delivered here, I must say that, in my judgment, the decision now under revision by this court is, in its principle, anti-commercial and anti-social, new and unheard of in our system, and calculated to break up the harmony which has so long prevailed among the States and people of this Union.

It is not, however, for the learned gentlemen nor for myself to say here that we speak for the country. We advance our

sentiments and our arguments, but they are without authority. It is for you, Messrs. Chief Justice and Judges, on this as on other occasions of high importance, to speak and decide for the country. The guardianship of her commercial interests; the preservation of the harmonious intercourse of all her citizens; the fulfilling in this respect of the great object of the Constitution, are in your hands; and I am not to doubt that the trust will be so performed as to sustain at once high national objects and the character of this tribunal.

The Girard Will Case

The Christian Ministry and the Religious Instruction of the Young*

Introductory Note

THE heirs at law of the late Stephen Girard, of Philadelphia, instituted a suit in October, 1836, in the Circuit Court of the Eastern District of Pennsylvania, sitting as a court of equity, to try the question of the validity of his will. In April, 1841, the cause came on for hearing in the Circuit Court, and was decided in favor of the will. The case was carried by appeal to the Supreme Court of the United States, at Washington, where it was argued by General Jones and Mr. Webster for the complainants and appellants, and by Messrs Binney and Sergeant for the validity of the will.

The following speech was made by Mr. Webster in the course of the trial at Washington. A deep impression was produced upon the public mind by those portions of it which enforced the intimate connection of the Christian ministry with the business of instruction, and the necessity of founding education on a religious basis.

This impression resulted in the following correspondence: —

"WASHINGTON, *February* 13, 1844.

"SIR: Inclosed is a copy of certain proceedings of a meeting held in reference to your argument in the Supreme Court of the case arising out of the late Mr. Girard's will. In communicating to you the request contained in the second resolution, we take leave to express our earnest hope that you may find it convenient to comply with that request.

"We are, Sir, with high consideration, yours, very respectfully,

P. R. FENDALL,
HORACE STRINGFELLOW,
JOSHUA N. DANFORTH,
R. R. GURLEY,
WILLIAM RUGGLES,
JOEL S. BACON,
THOMAS SEWALL,
WILLIAM B. EDWARDS,
} *Committee.*

"HON. DANIEL WEBSTER."

* A Speech delivered in the Supreme Court at Washington, on the 20th of February, 1844, in the case of François Fénelon Vidal, John F. Girard, and others, Complainants and Appellants, against The Mayor, Aldermen, and Citizens of Philadelphia, the Executors of Stephen Girard, and others, Defendants.

"At a meeting of a number of citizens, belonging to different religious denominations, of Washington and its vicinity, convened to consider the expediency of procuring the publication of so much of Mr. Webster's argument before the Supreme Court of the United States, in the case of François F. Vidal *et al.*, Appellants, *v.* The Mayor, Aldermen, and Citizens of Philadelphia, and Stephen Girard's Executors, as relates to that part of Mr. Girard's will which excludes ministers of religion from any station or duty in the college directed by the testator to be founded, and denies to them the right of visiting said college; the object of the meeting having been stated by Professor Sewall in a few appropriate remarks, the Hon. Henry L. Ellsworth was elected chairman, and the Rev. Isaac S. Tinsley secretary.

"Whereupon it was, on motion, unanimously resolved,

"1st. That, in the opinion of this meeting, the powerful and eloquent argument of Mr. Webster, on the before-mentioned clause of Mr. Girard's will, demonstrates the vital importance of Christianity to the success of our free institutions, and its necessity as the basis of all useful moral education; and that the general diffusion of that argument among the people of the United States is a matter of deep public interest.

"2d. That a committee of eight persons, of the several Christian denominations represented in this meeting, be appointed to wait on Mr. Webster, and, in the name and on behalf of this meeting, to request him to prepare for the press the portion referred to of his argument in the Girard case; and, should he consent to do so, to cause it to be speedily published and extensively disseminated.

"The following gentlemen were appointed the committee under the second resolution: Philip R. Fendall, Esq., Rev. Horace Stringfellow, Rev. Joshua N. Danforth, Rev. R. Randolph Gurley, Professor William Ruggles, Rev. President J. S. Bacon, Doctor Thomas Sewall, Rev. William B. Edwards.

"The meeting then adjourned.

"H. L. Ellsworth, *Chairman.*

"Isaac S. Tinsley, *Secretary.*"

"*Washington, February* 13, 1844.

"Gentlemen: I have the honor to acknowledge the receipt of your communication. Gentlemen connected with the public press have, I believe, reported my speech in the case arising under Mr. Girard's will. I will look over the report of that part of it to which you refer, so far as to see that it is free from material errors, but I have not leisure so to revise it as to give it the form of a careful or regular composition.

"I am, Gentlemen, with very true regard, your obedient servant,

"Daniel Webster.

"To Messrs. P. R. Fendall,
Horace Stringfellow,
Joshua N. Danforth,
R. R. Gurley,
William Ruggles,
Joel S. Bacon,
Thomas Sewall,
William B. Edwards."

The following mottoes were prefixed to this speech, in the original pamphlet edition.

"*Socrates.* If, then, you wish public measures to be right and noble, *virtue* must be given by you to the citizens.

"*Alcibiades.* How could any one deny that?

"*Socrates.* *Virtue*, therefore, is that which is to be first possessed, both by you and by every other person who would have direction and care, not only for himself and things dear to himself, but for the state and things dear to the state.

"*Alcibiades.* You speak truly.

"*Socrates.* To act justly and wisely (both you and the state), YOU MUST ACT ACCORDING TO THE WILL OF GOD.

"*Alcibiades.* It is so." *Plato.*

"Sic igitur hoc a principio persuasum civibus, dominos esse omnium rerum ac moderatores, deos." — *Cicero de Legibus.*

"We shall never be such fools as to call in an enemy to the substance of any system, to supply its defects, or to perfect its construction."

"If our religious tenets should ever want a further elucidation, we shall not call on atheism to explain them. We shall not light up our temple from that unhallowed fire."

"We know, and it is our pride to know, that man is, by his constitution, a religious animal." — *Burke.*

MAY IT PLEASE YOUR HONORS:

IT is not necessary for me to narrate, in detail, the numerous provisions of Mr. Girard's will. This has already been repeatedly done by other counsel, and I shall content myself with stating and considering those parts only which are immediately involved in the decision of this cause.

The will is drawn with apparent care and method, and is regularly divided into clauses. The first nineteen clauses contain various devises and legacies to relatives, to other private individuals, and to public bodies. By the twentieth clause the whole residue of his estate, real and personal, is devised and bequeathed to the "mayor, aldermen, and citizens of Philadelphia," in trust for the several uses to be after mentioned and declared.

The twenty-first clause contains the devise or bequest to the college, in these words: —

"And so far as regards the residue of my personal estate in trust, as to two millions of dollars, part thereof, to apply and expend so much of that sum as may be necessary in erecting, as soon as practicably may be, in the centre of my square of ground, between High and Chestnut Streets, and Eleventh and Twelfth Streets, in the city of Philadelphia,

(which square of ground I hereby devote for the purpose hereinafter stated, and for no other, for ever,) a permanent college, with suitable out-buildings sufficiently spacious for the residence and accommodation of at least three hundred scholars, and the requisite teachers and other persons necessary in such an institution as I direct to be established, and in supplying the said college and out-buildings with decent and suitable furniture, as well as books, and all things needful to carry into effect my general design."

The testator then proceeds to direct that the college shall be constructed of the most durable materials, avoiding needless ornament, and attending chiefly to the strength, convenience, and neatness of the whole; and gives directions, very much in detail, respecting the form of the building, and the size and fashion of the rooms. The whole square, he directs, shall be inclosed with a solid wall, at least fourteen inches thick and ten feet high, capped with marble, and guarded with irons on the top, so as to prevent persons from getting over; and there are to be two places of entrance into the square, with two gates at each, one opening inward and the other outward, those opening inward to be of iron, and those opening outward to be of wood-work, lined with sheet-iron.

The testator then proceeds to give his directions respecting the institution, laying down his plan and objects in several articles. The third article is in these words:—

"3. As many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain, shall be introduced into the college as soon as possible; and from time to time, as there may be vacancies, or as increased ability from income may warrant, others shall be introduced."

The fifth direction is as follows:—

"5 No orphan should be admitted until the guardians, or directors of the poor, or a proper guardian or other competent authority, shall have given, by indenture, relinquishment, or otherwise, adequate power to the mayor, aldermen, and citizens of Philadelphia, or to directors or others by them appointed, to enforce, in relation to each orphan, every proper restraint, and to prevent relations or others from interfering with or withdrawing such orphan from the institution."

By the sixth article, or direction, preference is to be given, first, to orphans born in Philadelphia; second, to those born in other parts of Pennsylvania; third, to those born in the city of New York; and, lastly, to those born in the city of New Orleans.

By the seventh article, it is declared, that the orphans shall be lodged, fed, and clothed in the college; that they shall be instructed in the various branches of a sound education, comprehending reading, writing, grammar, arithmetic, geography, navigation, surveying, practical mathematics, astronomy, natural, chemical, and experimental philosophy, and the French and Spanish languages, and such other learning and science as the capacities of the scholars may merit or want. The Greek and Latin languages are not forbidden, but are not recommended.

By the ninth article it is declared, that the boys shall remain in the college till they arrive at between fourteen and eighteen years of age, when they shall be bound out by the city government to suitable occupations, such as agriculture, navigation, and the mechanical trades.

The testator proceeds to say, that he necessarily leaves many details to the city government; and then adds, "There are, however, some restrictions which I consider it my duty to prescribe, and to be, amongst others, conditions on which my bequest for said college is made, and to be enjoyed."

The second of these restrictions is in the following words:—

"Secondly. I enjoin and require *that no ecclesiastic, missionary, or minister, of any sect whatever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college.*

"In making this restriction, I do not mean to cast any reflection upon any sect or person whatsoever; but, as there is such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans who are to derive advantage from this bequest free from the excitement which clashing doctrines and sectarian controversy are so apt to produce; my desire is, that all the instructors and teachers in the college shall take pains to instil into the minds of the scholars *the purest principles of morality*, so that on their entrance into active life they may, *from inclination* and habit, evince *benevolence towards their fellow-creatures, and a love of truth, sobriety, and industry*, adopting at the same time such religious tenets as their *matured reason* may enable them to prefer."

The testator having, after the date of his will, bought a house in Penn Township, with forty-five acres of land, he made a codicil, by which he directed the college to be built on this estate, instead of the square mentioned in the will, and the whole

establishment to be made thereon, just as if he had in his will devoted the estate to that purpose. The city government has accordingly been advised that the whole forty-five acres must be inclosed with the same high wall, as was provided in the will for the square in the city.

I have now stated, I believe, all the provisions of the will which are material to the discussion of that part of the case which respects the character of the institution.

The first question is, whether this devise can be sustained, otherwise than as a charity, and by that special aid and assistance by which courts of equity support gifts to charitable uses.

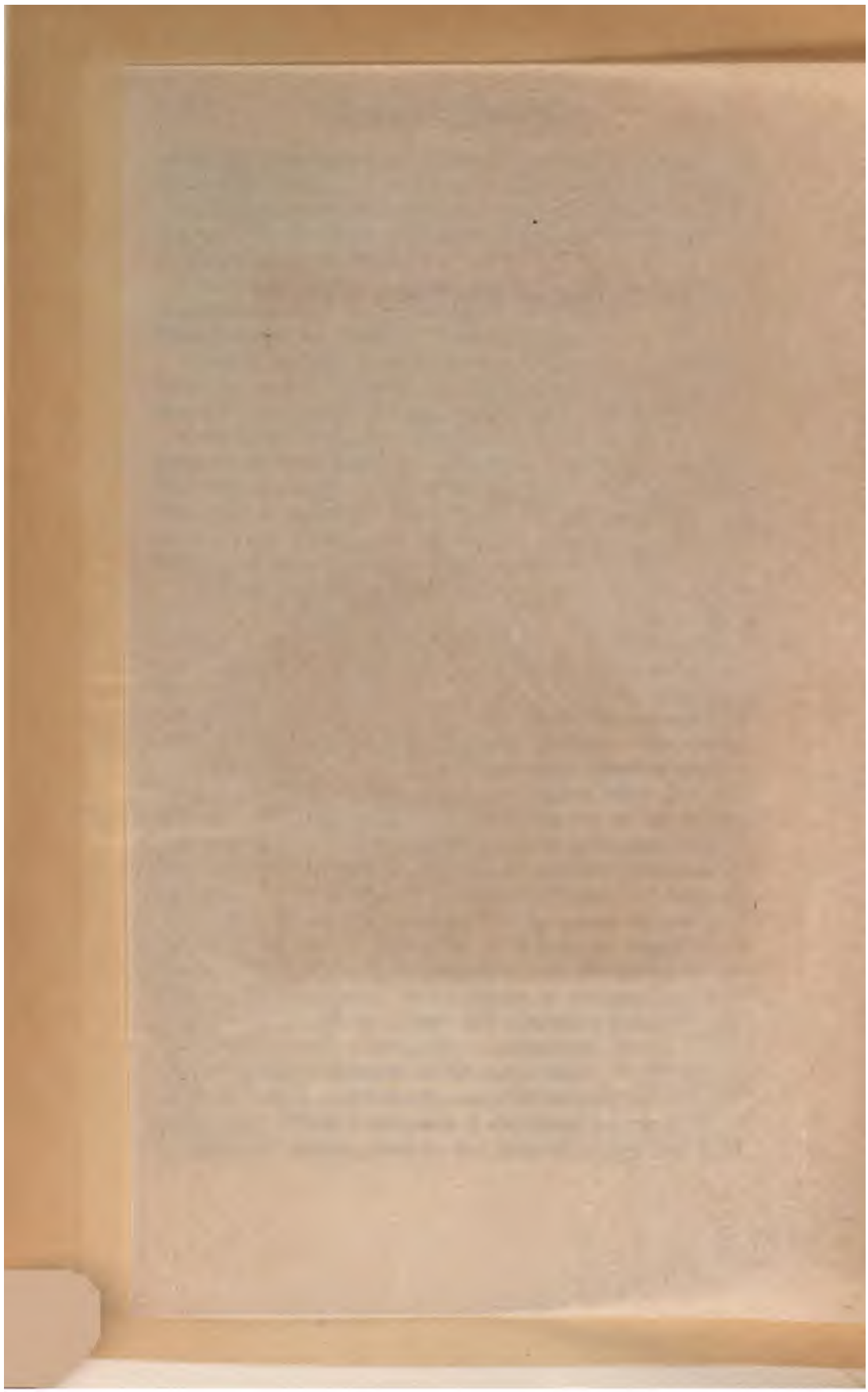
If the devise be a good limitation at law, if it require no exercise of the favor which is bestowed on privileged testaments, then there is already an end to the question. But I take it that this point is conceded. The devise is void, according to the general rules of law, on account of the uncertainty in the description of those who are intended to receive its benefits.

"Poor white male orphan children" is so loose a description, that no one can bring himself within the terms of the bequest, so as to say that it was made in his favor. No individual can acquire any right or interest; nobody, therefore, can come forward as a party, in a court of law, to claim participation in the gift. The bequest must stand, if it stand at all, on the peculiar rules which equitable jurisprudence applies to charities. This is clear.

I proceed, therefore, to submit, and most conscientiously to argue, a question, certainly one of the highest which this court has ever been called upon to consider, and one of the highest, and most important, in my opinion, ever likely to come before it. That question is, *whether, in the eye of equitable jurisprudence, this devise be a charity at all.* I deny that it is so. I maintain, that neither by judicial decisions nor by correct reasoning on general principles can this devise or bequest be regarded as a charity. This part of the argument is not affected by the particular judicial system of Pennsylvania, or the question of the power of her courts to uphold and administer charitable gifts. The question which I now propose respects the inherent, essential, and manifest character of the devise itself. In this respect, I wish to express myself clearly, and to be correctly and distinctly understood. What I have said I shall stand by, and endeavor to maintain; namely, that in the view of a court of equity

Stephen Girard

From a Photograph of the Painting by Lambdin



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this devise *is no charity at all.* It is no charity, because the plan of education proposed by Mr. Girard is derogatory to the Christian religion; tends to weaken men's reverence for that religion, and their conviction of its authority and importance, and therefore, in its general character, tends to mischievous, and not to useful ends.

The proposed school is to be founded on plain and clear principles, and for plain and clear objects, of infidelity. This cannot well be doubted; and a gift, or devise, for such objects is not a charity, and as such entitled to the well-known favor with which charities are received and upheld by the courts of Christian countries.

In the next place, the object of this bequest is against the public policy of the State of Pennsylvania, in which State Christianity is declared to be the law of the land. For that reason, therefore, as well as the other, the devise ought not to be allowed to take effect.

These are the two propositions which it is my purpose to maintain, on this part of the case.

This scheme of instruction begins by attempting to attach reproach and odium to the whole clergy of the country. It places a brand, a stigma, on every individual member of the profession, without an exception. No minister of the Gospel, of any denomination, is to be allowed to come within the grounds belonging to this school, on any occasion, or for any purpose whatever. They are all rigorously excluded, as if their mere presence might cause pestilence. We have heard it said that Mr. Girard, by this will, distributed his charity without distinction of sect or party. However that may be, Sir, he certainly has dealt out opprobrium to the whole profession of the clergy, without regard to sect or party.

By this will, no minister of the Gospel of any sect or denomination whatever can be authorized or allowed to hold any office within the college; and not only that, but no minister or clergyman of any sect can, for any purpose whatever, enter within the walls that are to surround this college. If a clergyman has a sick nephew, or a sick grandson, he cannot, upon any pretext, be allowed to visit him within the walls of the college. The provision of the will is express and decisive. Still less may a clergyman enter to offer consolation to the sick, or to unite in prayer with the dying.

Now, I will not arraign Mr. Girard or his motives for this. I will not inquire into Mr. Girard's opinions upon religion. But I feel bound to say, the occasion demands that I should say, that this is the most opprobrious, the most insulting and unmerited stigma, that ever was cast, or attempted to be cast, upon the preachers of Christianity, from north to south, from east to west, through the length and breadth of the land, in the history of the country. When have they deserved it? Where have they deserved it? How have they deserved it? They are not to be allowed even the ordinary rights of hospitality; not even to be permitted to put their foot over the threshold of this college!

Sir, I take it upon myself to say, that in no country in the world, upon either continent, can there be found a body of ministers of the Gospel who perform so much service to man, in such a full spirit of self-denial, under so little encouragement from government of any kind, and under circumstances almost always much straitened and often distressed, as the ministers of the Gospel in the United States, of all denominations. They form no part of any established order of religion; they constitute no hierarchy; they enjoy no peculiar privileges. In some of the States they are even shut out from all participation in the political rights and privileges enjoyed by their fellow-citizens. They enjoy no tithes, no public provision of any kind. Except here and there, in large cities, where a wealthy individual occasionally makes a donation for the support of public worship, what have they to depend upon? They have to depend entirely on the voluntary contributions of those who hear them.

And this body of clergymen has shown, to the honor of their own country and to the astonishment of the hierarchies of the Old World, that it is practicable in free governments to raise and sustain by voluntary contributions alone a body of clergymen, which, for devotedness to their sacred calling, for purity of life and character, for learning, intelligence, piety, and that wisdom which cometh from above, is inferior to none, and superior to most others.

I hope that our learned men have done something for the honor of our literature abroad. I hope that the courts of justice and members of the bar of this country have done something to elevate the character of the profession of the law. I hope that the discussions above (in Congress) have done something

to meliorate the condition of the human race, to secure and extend the great charter of human rights, and to strengthen and advance the great principles of human liberty. But I contend that no literary efforts, no adjudications, no constitutional discussions, nothing that has been done or said in favor of the great interests of universal man, has done this country more credit, at home and abroad, than the establishment of our body of clergymen, their support by voluntary contributions, and the general excellence of their character for piety and learning.

The great truth has thus been proclaimed and proved, a truth which I believe will in time to come shake all the hierarchies of Europe, that the voluntary support of such a ministry, under free institutions, is a practicable idea.

And yet every one of these, the Christian ministers of the United States, is by this devise denied the privileges which are at the same time open to the vilest of our race; every one is shut out from this, I had almost said, *sanctum*, but I will not profane that word by such a use of it.

Did a man ever live that had a respect for the Christian religion, and yet had no regard for *any one* of its ministers? Did that system of instruction ever exist, which denounced the whole body of Christian teachers, and yet called itself a system of Christianity?

The learned counsel on the other side see the weak points of this case. They are not blind. They have, with the aid of their great learning, industry, and research, gone back to the time of Constantine, they have searched the history of the Roman emperors, the Dark Ages, and the intervening period, down to the settlement of these colonies; they have explored every nook and corner of religious and Christian history, to find out the various meanings and uses of Christian charity; and yet, with all their skill and all their research, they have not been able to discover any thing which has ever been regarded as a Christian charity, that sets such an opprobrium upon the forehead of all its ministers. If, with all their endeavors, they can find any one thing which has been so regarded, *they may have their college*, and make the most of it. But the thing does not exist; it *never had a being;* history does not record it, common sense revolts at it. It certainly is not necessary for me to make an ecclesiastical argument in favor of this proposition. The thing is so plain, that it must instantly commend itself to your honors.

It has been said that Mr. Girard was charitable. I am not now going to controvert this. I hope he was. I hope he has found his reward. It has also been asked, "Cannot Mr. Girard be allowed to have his own will, to devise his property according to his own desire?" Certainly he can, in any legal devise, and the law will sustain him therein. But it is not for him to overturn the law of the land. The law cannot be altered to please Mr. Girard. He found that out, I believe, in two or three instances in his lifetime. Nor can the law be altered on account of the magnitude and munificence of the bounty. What is the value of that bounty, however great or munificent, which touches the very foundations of human society, which touches the very foundations of Christian charity, which touches the very foundations of public law, and the Constitution, and the whole welfare of the state?

And now, let me ask, What is, in contemplation of law, "a charity"? The word has various significations. In the larger and broader sense, it means the kindly exercise of the social affections, all the good feelings which man entertains towards man. Charity is love. This is that charity of which St. Paul speaks, that charity which covereth the sins of men, "that suffereth all things, hopeth all things." In a more popular sense, charity is alms-giving or active benevolence.

But the question for your honors to decide here is, What is a charity, or a charitable use, in contemplation of law? To answer this inquiry, we are generally referred to the objects enumerated in the 43d of Elizabeth. The objects enumerated in that statute, and others analogous to them, are charities in the sense of equitable jurisprudence.

There is no doubt that a school of learning is a charity. It is one of those mentioned in the statutes. Such a school of learning as was contemplated by the statutes of Elizabeth is a charity; and all such have borne that name and character to this day. I mean to confine myself to that description of charity, the statute charity, and to apply it to this case alone.

The devise before us proposes to establish, as its main object, a school of learning, a college. There are provisions, of course for lodging, clothing, and feeding the pupils, but all this is subsidiary. The great object is the instruction of the young; although it proposes to give the children better food and clothes and lodging, and proposes that the system of education shall be

somewhat better than that which is usually provided for the poor and destitute in our public institutions generally.

The main object, then, is to establish a school of learning for children, beginning with them at a very tender age, and retaining them (namely, from six years to eighteen) till they are on the verge of manhood, when they will have expended more than one third part of the average duration of human life. For if the college takes them at six, and keeps them till they are eighteen, a period of twelve years will be passed within its walls; more than a third part of the average of human life. These children, then, are to be taken almost before they learn their alphabet, and be discharged about the time that men enter on the active business of life. At six, many do not know their alphabet. John Wesley did not know a letter till after he was six years old, and his mother then took him on her lap, and taught him his alphabet at a single lesson. There are many parents who think that any attempt to instil the rudiments of education into the mind of a child at an earlier age, is little better than labor thrown away.

The great object, then, which Mr. Girard seemed to have in view, was to take these orphans at this very tender age, and to keep them within his walls until they were entering manhood. And this object I pray your honors steadily to bear in mind.

I never, in the whole course of my life, listened to any thing with more sincere delight, than to the remarks of my learned friend who opened this cause, on the nature and character of true charity. I agree with every word he said on that subject. I almost envy him his power of expressing so happily what his mind conceives so clearly and correctly. He is right when he speaks of it as an emanation from the Christian religion. He is right when he says that it has its origin in the word of God. He is right when he says that it was unknown throughout all the world till the first dawn of Christianity. He is right, pre-eminently right, in all this, as he was preëminently happy in his power of clothing his thoughts and feelings in appropriate forms of speech. And I maintain, that, in any institution for the instruction of youth, where the authority of God is disowned, and the duties of Christianity derided and despised, and its ministers shut out from all participation in its proceedings, there can no more be charity, true charity, found to exist, than evil can spring out of the Bible, error out of truth, or hatred

and animosity come forth from the bosom of perfect love. No, Sir! No, Sir! If charity denies its birth and parentage, if it turns infidel to the great doctrines of the Christian religion, if it turns unbeliever, it is no longer charity! There is no longer charity, either in a Christian sense or in the sense of jurisprudence; for it separates itself from the fountain of its own creation.

There is nothing in the history of the Christian religion; there is nothing in the history of English law, either before or after the Conquest; there can be found no such thing as a school of instruction in a Christian land, from which the Christian religion has been, of intent and purpose, rigorously and opprobriously excluded, and yet such school regarded as a charitable trust or foundation. This is the first instance on record. I do not say that there may not be charity schools in which religious instruction is not provided. I need not go that length, although I take that to be the rule of the English law. But what I do say, and repeat, is, that a school for the instruction of the young, which sedulously and reproachfully excludes Christian knowledge, is no charity, either on principle or authority, and is not, therefore, entitled to the character of a charity in a court of equity. I have considered this proposition, and am ready to stand by it.

I will not say that there may not be a charity for instruction, in which there is no positive provision for the Christian religion. But I do say, and do insist, that there is no such thing in the history of religion, no such thing in the history of human law, as a charity, a school of instruction for children, from which the Christian religion and Christian teachers are excluded, as unsafe and unworthy intruders. Such a scheme is deprived of that which enters into the very essence of human benevolence, when that benevolence contemplates instruction, that is to say, religious knowledge, connected with human knowledge. It is this which causes it to be regarded as a charity; and by reason of this it is entitled to the special favor of the courts of law. This is the vital question which must be decided by this court. It is vital to the understanding of what the law is, it is vital to the validity of this devise.

If this be true, if there can be no charity in that plan of education which opposes Christianity, then that goes far to decide this case. I take it that this court, in looking at this subject,

will see the important bearing of this point upon it. The learned counsel said that the State of Pennsylvania was not an infidel State. It is true that she is not an infidel State. She has a Christian origin, a Christian code of laws, a system of legislation founded on nothing else, in many of its important bearings upon human society, than the belief of the people of Pennsylvania, their firm and sincere belief, in the divine authority and great importance of the truths of the Christian religion. And she should the more carefully seek to preserve them pure.

Now, let us look at the condition and prospects of these tender children, who are to be submitted to this experiment of instruction without Christianity. In the first place, they are orphans, have no parents to guide or instruct them in the way in which they should go, no father, no religious mother, to lead them to the pure fount of Christianity; *they are orphans.* If they were only poor, there might be somebody bound by ties of human affection to look after their spiritual welfare; to see that they imbibed no erroneous opinions on the subject of religion; that they run into no excessive improprieties of belief as well as conduct. The child would have its father or mother to teach it to lisp the name of its Creator in prayer, or hymn His praise. But in this experimental school of instruction, if the orphans have any friends or connections able to look after their welfare, it shuts them out. It is made the duty of the governors of the institution, on taking the child, so to make out the indentures of apprenticeship as to keep him from any after interference in his welfare on the part of guardians or relatives; to keep them from withdrawing him from the school, or interfering with his instruction whilst he is in the school, in any manner whatever.

The school or college is to be surrounded by high walls; there are to be two gates in these walls, and no more; they are to be of iron within, and iron bound or covered without; thus answering more to the description of a castle than a school-house. The children are to be thus guarded for twelve years in this, I do not mean to say a prison, nor do I mean to say that this is exactly close confinement; but it is much closer confinement than ordinarily is met with, under the rules of any institution at present, and has a resemblance to the monastic institutions of past ages, rather than to any school for instruction at this period, at least in this country.

All is to be within one great inclosure; all that is done for the bodily or mental welfare of the child is to be done within this great wall. It has been said that the children could attend public worship elsewhere. Where is the proof of this? There is no such provision in the devise; there is nothing said about it in any part of Mr. Girard's will; and I shall show presently that any such thing would be just as adverse to Mr. Girard's whole scheme, as it would be that the doctrines of Christianity should be preached within the walls of the college.

These children, then, are taken before they know the alphabet. They are kept till the period of early manhood, and then sent out into the world to enter upon its business and affairs. By this time, the character will have been stamped. For if there is any truth in the Bible, if there is any truth in those oracles which soar above all human authority, or if any thing be established as a general fact, by the experience of mankind, in this first third of human life the character is formed. And what sort of a character is likely to be made by this process, this experimental system of instruction?

I have read the two provisions of Mr. Girard's will in relation to this feature of his school. The first excludes the Christian religion and all its ministers from its walls. The second explains the whole principles upon which he purposes to conduct his school. It was to try an experiment in education, never before known to the Christian world. It had been recommended often enough among those who did not belong to the Christian world. But it was never known to exist, never adopted by any body even professing a connection with Christianity. And I cannot do better, in order to show the tendency and object of this institution, than to read from a paper by Bishop White, which has been referred to by the other side.*

In order to a right understanding of what was Mr. Girard's real intention and original design, we have only to read carefully the words of the clause I have referred to. He njoins that no ministers of religion, of any sects, shall be allowed to enter his college, on any pretence whatever. Now, it is obvious, that by sects he means Christian sects. Any of the followers of Voltaire or D'Alembert may have admission into this school whenever they please, because they are not usu-

* See Appendix, No. I.

ally spoken of as "sects." The doors are to be opened to the opposers and revilers of Christianity, in every form and shape, and shut to its supporters. While the voice of the upholders of Christianity is never to be heard within the walls, the voices of those who impugn Christianity may be raised high and loud, till they shake the marble roof of the building. It is no less derogatory thus to exclude the one, and admit the other, than it would be to make a positive provision and all the necessary arrangements for lectures and lessons and teachers, for all the details of the doctrines of infidelity. It is equally derogatory, it is the same in principle, thus to shut the door to one party, and open the door to the other.

We must reason as to the probable results of such a system according to natural consequences. They say, on the other side, that infidel teachers will not be admitted in this school. How do they know that? What is the inevitable tendency of such an education as is here prescribed? What is likely to occur? The court cannot suppose that the trustees will act in opposition to the directions of the will. If they accept the trust, they must fulfil it, and carry out the details of Mr. Girard's plan.

Now, what is likely to be the effect of this system on the minds of these children, thus left solely to its pernicious influence, with no one to care for their spiritual welfare in this world or the next? They are to be left entirely to the tender mercies of those who will try upon them this experiment of moral philosophy or philosophical morality. Morality without sentiment; benevolence towards man, without a sense of responsibility towards God; the duties of this life performed, without any reference to the life which is to come; this is Mr. Girard's theory of useful education.

Half of these poor children may die before the term of their education expires. Still, those who survive must be brought up imbued fully with the inevitable tendencies of the system.

It has been said that there may be lay preachers among them. Lay preachers! This is ridiculous enough in a country of Christianity and religion. [Here some one handed Mr. Webster a note.] A friend informs me that four of the principal religious sects in this country, the Episcopalians, Presbyterians, Methodists, and Baptists, allow no lay preachers; and these

four constitute a large majority of the religious and Christian portion of the people of the United States. And, besides, lay preaching would be just as adverse to Mr. Girard's original object and whole plan as professional preaching, *provided it should be Christianity which should be preached.*

It is plain, as plain as language can be made, that he did not intend to allow the minds of these children to be troubled about religion of any kind, whilst they were within the college. And why? He himself assigns the reason. Because of the difficulty and trouble, he says, that might arise from the multitude of sects, and creeds, and teachers, and the various clashing doctrines and tenets advanced by the different preachers of Christianity. Therefore his desire as to these orphans is, that their minds should be kept free from all bias of any kind in favor of any description of Christian creed, till they arrived at manhood, and should have left the walls of his school.

Now, are not laymen equally sectarian in their views with clergymen? And would it not be just as easy to prevent sectarian doctrines from being preached by a clergyman as from being taught by a layman? It is idle, therefore, to speak of lay preaching.

MR. SERGEANT here rose, and said that they on their side had not uttered one word about lay preaching. It was lay teaching they spoke of.

Well, I would just as soon take it that way as the other, *teaching* as preaching. Is not the teaching of laymen as sectarian as the preaching of clergymen? What is the difference between unlettered laymen and lettered clergymen in this respect? Every one knows that laymen are as violent controversialists as clergymen, and the less informed the more violent. So this, while it is a little more ridiculous, is equally obnoxious. According to my experience, a layman is just as likely to launch out into sectarian views, and to advance clashing doctrines and violent, bigoted prejudices, as a professional preacher, and even more so. Every objection to professional religious instruction applies with still greater force to lay teaching. As in other cases, so in this, the greatest degree of candor is usually found accompanying the greatest degree of knowledge. Nothing is more apt to be positive and dogmatical than ignorance.

But there is no provision in any part of Mr. Girard's will

for the introduction of any lay teaching on religious matters whatever. The children are to get their religion when they leave his school, and they are to have nothing to do with religion before they do leave it. They are then to choose their religious opinions, and not before.

MR. BINNEY. "Choose their tenets" is the expression.

Tenets are opinions, I believe. The mass of one's religious tenets makes up one's religion.

Now, it is evident that Mr. Girard meant to found a school of morals, without any reference to, or connection with, religion. But, after all, there is nothing original in this plan of his. It has its origin in a deistical source, but not from the highest school of infidelity. Not from Bolingbroke, or Shaftesbury, or Gibbon; not even from Voltaire or D'Alembert. It is from two persons who were probably known to Mr. Girard in the early part of his life; it is from Mr. Thomas Paine and Mr. Volney. Mr. Thomas Paine, in his Age of Reason, says: 'Let us devise means to establish schools of instruction, that we may banish the ignorance that the ancient *régime* of kings and priests has spread among the people. Let us propagate morality, unfettered by superstition."

MR. BINNEY. What do you get that from?

The same place that Mr. Girard got this provision of his will from, Paine's Age of Reason. The same phraseology in effect is here. Paine disguised his real meaning, it is true. He said: "Let us devise means to establish schools to propagate morality, unfettered by *superstition*." Mr. Girard, who had no disguise about him, uses plain language to express the same meaning. In Mr. Girard's view, *religion* is just that thing which Mr. Paine calls *superstition*. "Let us establish schools of morality," said he, "unfettered by religious tenets. Let us give these children a system of pure morals before they adopt any religion." The ancient *régime* of which Paine spoke as obnoxious was that of kings and priests. That was the popular way he had of making any thing obnoxious that he wished to destroy. Now, if he had *merely* wished to get rid of the dogmas which he says were established by kings and priests, if he had no desire to abolish the Christian religion itself, he could have thus expressed himself: "Let us rid ourselves of the errors of

kings and priests, and plant morality on the plain text of the Christian religion, with the simplest forms of religious worship."

I do not intend to leave this part of the cause, however, without a still more distinct statement of the objections to this scheme of instruction. This is due, I think, to the subject and to the occasion; and I trust I shall not be considered presumptuous, or as trenching upon the duties which properly belong to another profession. But I deem it due to the cause of Christianity to take up the notions of this scheme of Mr. Girard, and show how mistaken is the idea of calling it a charity. In the first place, then, I say, this scheme is derogatory to Christianity, because it rejects Christianity from the education of youth, by rejecting its teachers, by rejecting the ordinary agencies of instilling the Christian religion into the minds of the young. I do not say that, in order to make this a charity, there should be a positive provision for the teaching of Christianity, although, as I have already observed, I take that to be the rule in an English court of equity. But I need not, in this case, claim the whole benefit of that rule. I say it is derogatory, because there is a positive rejection of Christianity; because it rejects the ordinary means and agencies of Christianity. He who rejects the ordinary means of accomplishing an end, means to defeat that end itself, or else he has no meaning. And this is true, although the means originally be means of human appointment, and not attaching to or resting on any higher authority.

For example, if the New Testament had contained a set of principles of morality and religion, without reference to the means by which those principles were to be established, and if in the course of time a system of means had sprung up, become identified with the history of the world, become general, sanctioned by continued use and custom, then he who should reject those means would design to reject, and would reject, that morality and religion themselves.

This would be true in a case where the end rested on divine authority, and human agency devised and used the means. But if the means themselves be of divine authority also, then the rejection of them is a direct rejection of that authority.

Now, I suppose there is nothing in the New Testament more clearly established by the Author of Christianity, than the appointment of a Christian ministry. The world was to be evan-

gelized, was to be brought out of darkness into light, by the influences of the Christian religion, spread and propagated by the instrumentality of man. A Christian ministry was therefore appointed by the Author of the Christian religion himself, and it stands on the same authority as any other part of his religion. When the lost sheep of the house of Israel were to be brought to the knowledge of Christianity, the disciples were commanded to go forth into all the cities, and to preach "that the kingdom of heaven is at hand." It was added, that whosoever would not receive them, nor hear their words, it should be more tolerable for Sodom and Gomorrha than for them. And after his resurrection, in the appointment of the great mission to the whole human race, the Author of Christianity commanded his disciples that they should "go into all the world, and preach the Gospel to every creature." This was one of his last commands; and one of his last promises was the assurance, "Lo, I am with you alway, even to the end of the world!" I say, therefore, there is nothing set forth more authentically in the New Testament than the appointment of a Christian ministry; and he who does not believe this does not and cannot believe the rest.

It is true that Christian ministers, in this age of the world, are selected in different ways and different modes by different sects and denominations. But there are, still, ministers of all sects and denominations. Why should we shut our eyes to the whole history of Christianity? Is it not the preaching of ministers of the Gospel that has evangelized the more civilized part of the world? Why do we at this day enjoy the lights and benefits of Christianity ourselves? Do we not owe it to the instrumentality of the Christian ministry? The ministers of Christianity, departing from Asia Minor, traversing Asia, Africa, and Europe, to Iceland, Greenland, and the poles of the earth, suffering all things, enduring all things, hoping all things, raising men everywhere from the ignorance of idol worship to the knowledge of the true God, and everywhere bringing life and immortality to light through the Gospel, have only been acting in obedience to the Divine instruction; they were commanded to go forth, and they have gone forth, and they still go forth. They have sought, and they still seek, to be able to preach the Gospel to every creature under the whole heaven.

And where was Christianity ever received, where were its truths ever poured into the human heart, where did its waters, springing up into everlasting life, ever burst forth, except in the track of a Christian ministry? Did we ever hear of an instance, does history record an instance, of any part of the globe Christianized by lay preachers or "lay teachers"? And, descending from kingdoms and empires to cities and countries, to parishes and villages, do we not all know, that wherever Christianity has been carried, and wherever it has been taught, by human agency, that agency was the agency of ministers of the Gospel? It is all idle, and a mockery, to pretend that any man has respect for the Christian religion who yet derides, reproaches, and stigmatizes all its ministers and teachers. It is all idle, it is a mockery, and an insult to common sense, to maintain that a school for the instruction of youth, from which Christian instruction by Christian teachers is sedulously and rigorously shut out, is not deistical and infidel both in its purpose and in its tendency. I insist, therefore, that this plan of education is, in this respect, derogatory to Christianity, in opposition to it, and calculated either to subvert or to supersede it.

In the next place, this scheme of education is derogatory to Christianity, because it proceeds upon the presumption that the Christian religion is not the only true foundation, or any necessary foundation, of morals. The ground taken is, that religion is not necessary to morality; that benevolence may be insured by habit, and that all the virtues may flourish, and be safely left to the chance of flourishing, without touching the waters of the living spring of religious responsibility. With him who thinks thus, what can be the value of the Christian revelation? So the Christian world has not thought; for by that Christian world, throughout its broadest extent, it has been, and is, held as a fundamental truth, that religion is the only solid basis of morals, and that moral instruction not resting on this basis is only a building upon sand. And at what age of the Christian era have those who professed to teach the Christian religion, or to believe in its authority and importance, not insisted on the absolute necessity of inculcating its principles and its precepts upon the minds of the young? In what age, by what sect, where, when, by whom, has religious truth been excluded from the education of youth? Nowhere; never.

Everywhere, and at all times, it has been, and is, regarded as essential. It is of the essence, the vitality, of useful instruction. From all this Mr. Girard dissents. His plan denies the necessity and the propriety of religious instruction as a part of the education of youth. He dissents, not only from all the sentiments of Christian mankind, from all common conviction, and from the results of all experience, but he dissents also from still higher authority, the word of God itself. My learned friend has referred, with propriety, to one of the commands of the Decalogue; but there is another, a first commandment, and that is a precept of religion, and it is in subordination to this that the moral precepts of the Decalogue are proclaimed. This first great commandment teaches man that there is one, and only one, great First Cause, one, and only one, proper object of human worship. This is the great, the ever fresh, the overflowing fountain of all revealed truth. Without it, human life is a desert, of no known termination on any side, but shut in on all sides by a dark and impenetrable horizon. Without the light of this truth, man knows nothing of his origin, and nothing of his end. And when the Decalogue was delivered to the Jews, with this great announcement and command at its head, what said the inspired lawgiver? that it should be kept from children? that it should be reserved as a communication fit only for mature age? Far, far otherwise. "And these words, which I command thee this day, shall be in thy heart. And thou shalt teach them diligently unto thy children, and shall talk of them when thou sittest in thy house, and when thou walkest by the way, when thou liest down, and when thou risest up."

There is an authority still more imposing and awful. When little children were brought into the presence of the Son of God, his disciples proposed to send them away; but he said, "Suffer little children to come unto me." Unto *me;* he did not send them first for lessons in morals to the schools of the Pharisees or to the unbelieving Sadducees, nor to read the precepts and lessons *phylacteried* on the garments of the Jewish priesthood; he said nothing of different creeds or clashing doctrines; but he opened at once to the youthful mind the everlasting fountain of living waters, the only source of eternal truths: "Suffer little children to come *unto me.*" And that injunction is of perpetual obligation. It addresses itself to-day with the same

earnestness and the same authority which attended its first utterance to the Christian world. It is of force everywhere, and at all times. It extends to the ends of the earth, it will reach to the end of time, always and everywhere sounding in the ears of men, with an emphasis which no repetition can weaken, and with an authority which nothing can supersede: "Suffer little children to come unto me."

And not only my heart, and my judgment, my belief, and my conscience, instruct me that this great precept should be obeyed, but the idea is so sacred, the solemn thoughts connected with it so crowd upon me, it is so utterly at variance with this system of philosophical *morality* which we have heard advocated, that I stand and speak here in fear of being influenced by my feelings to exceed the proper line of my professional duty. Go thy way at this time, is the language of philosophical morality, and I will send for thee at a more convenient season. This is the language of Mr. Girard in his will. In this there is neither religion nor reason.

The earliest and the most urgent intellectual want of human nature is the knowledge of its origin, its duty, and its destiny. "Whence am I, what am I, and what is before me?" This is the cry of the human soul, so soon as it raises its contemplation above visible, material things.

When an intellectual being finds himself on this earth, as soon as the faculties of reason operate, one of the first inquiries of his mind is, "Shall I be here always?" "Shall I live here for ever?" And reasoning from what he sees daily occuring to others, he learns to a certainty that his state of being must one day be changed. I do not mean to deny, that it may be true that he is created with this consciousness; but whether it be consciousness, or the result of his reasoning faculties, man soon learns that he must die. And of all sentient beings, he alone, so far as we can judge, attains to this knowledge. His Maker has made him capable of learning this. Before he knows his origin and destiny, he knows that he is to die. Then comes that most urgent and solemn demand for light that ever proceeded, or can proceed, from the profound and anxious broodings of the human soul. It is stated, with wonderful force and beauty, in that incomparable composition, the book of Job: "For there is hope of a tree, if it be cut down, that it will sprout

again, and that the tender branch thereof will not cease; that, through the scent of water, it will bud, and bring forth boughs like a plant. *But if a man die, shall he live again?*" And that question nothing but God, and the religion of God, can solve. Religion does solve it, and teaches every man that he is to live again, and that the duties of this life have reference to the life which is to come. And hence, since the introduction of Christianity, it has been the duty, as it has been the effort, of the great and the good, to sanctify human knowledge, to bring it to the fount, and to baptize learning into Christianity; to gather up all its productions, its earliest and its latest, its blossoms and its fruits, and lay them all upon the altar of religion and virtue.

Another important point involved in this question is, What becomes of the Christian Sabbath, in a school thus established? I do not mean to say that this stands exactly on the same authority as the Christian religion, but I mean to say that the observance of the Sabbath is a part of Christianity in all its forms. All Christians admit the observance of the Sabbath. All admit that there is a Lord's day, although there may be a difference in the belief as to which is the right day to be observed. Now, I say that in this institution, under Mr. Girard's scheme, the ordinary observance of the Sabbath could not take place, because the ordinary means of observing it are excluded. I know that I shall be told here, also, that lay teachers would come in again; and I say again, in reply, that, where the ordinary means of attaining an end are excluded, the intention is to exclude the end itself. There can be no Sabbath in this college, there can be no religious observance of the Lord's day; for there are no means for attaining that end. It will be said, that the children would be permitted to go out. There is nothing seen of this permission in Mr. Girard's will. And I say again, that it would be just as much opposed to Mr. Girard's whole scheme to allow these children to go out and attend places of public worship on the Sabbath day, as it would be to have ministers of religion to preach to them within the walls; because, if they go out to hear preaching, they will hear just as much about religious controversies, and clashing doctrines, and more, than if appointed preachers officiated in the college. His object, as he states, was to keep their minds free from all religious doctrines and sects, and he would just as much defeat his

ends by sending them out as by having religious instruction within. Where, then, are these little children to go? Where can they go to learn the truth, to reverence the Sabbath? They are far from their friends, they have no one to accompany them to any place of worship, no one to show them the right from the wrong course; their minds must be kept clear from all bias on the subject, and they are just as far from the ordinary observance of the Sabbath as if there were no Sabbath day at all. And where there is no observance of the Christian Sabbath, there will of course be no public worship of God.

In connection with this subject I will observe, that there has been recently held a large convention of clergymen and laymen in Columbus, Ohio, to lead the minds of the Christian public to the importance of a more particular observance of the Christian Sabbath; and I will read, as part of my argument, an extract from their address, which bears with peculiar force upon this case.

"It is alike obvious that the Sabbath exerts its salutary power by making the population acquainted with the being, perfections, and laws of God; with our relations to him as his creatures, and our obligations to him as rational, accountable subjects, and with our character as sinners, for whom his mercy has provided a Saviour; under whose government we live to be restrained from sin and reconciled to God, and fitted by his word and spirit for the inheritance above.

"It is by the reiterated instruction and impression which the Sabbath imparts to the population of a nation, by the moral principle which it forms, by the conscience which it maintains, by the habits of method, cleanliness, and industry it creates, by the rest and renovated vigor it bestows on exhausted human nature, by the lengthened life and higher health it affords, by the holiness it inspires, and cheering hopes of heaven, and the protection and favor of God, which its observance insures, that the Sabbath is rendered the moral conservator of nations.

"The omnipresent influence the Sabbath exerts, however, by no secret charm or compendious action, upon masses of unthinking minds; but by arresting the stream of worldly thoughts, interests, and affections, stopping the din of business, unlading the mind of its cares and responsibilities, and the body of its burdens, while God speaks to men, and they attend, and hear, and fear, and learn to do his will.

"You might as well put out the sun, and think to enlighten the world with tapers, destroy the attraction of gravity, and think to wield the universe by human powers, as to extinguish the moral illumination of the Sabbath, and break this glorious main-spring of the moral government of God."

And I would ask, Would any Christian man consider it desirable for his orphan children, after his death, to find refuge within this asylum, under all the circumstances and influences which will necessarily surround its inmates? Are there, or will there be, any Christian parents who would desire that their children should be placed in this school, to be for twelve years exposed to the pernicious influences which must be brought to bear on their minds? I very much doubt if there is any Christian father who hears me this day, and I am quite sure that there is no Christian mother, who, if called upon to lie down on the bed of death, although sure to leave her children as poor as children can be left, who would not rather trust them, nevertheless, to the Christian charity of the world, however uncertain it has been said to be, than place them where their physical wants and comforts would be abundantly attended to, but away from the solaces and consolations, the hopes and the grace, of the Christian religion. She would rather trust them to the mercy and kindness of that spirit, which, when it has nothing else left, gives a cup of cold water in the name of a disciple; to that spirit which has its origin in the fountain of all good, and of which we have on record an example the most beautiful, the most touching, the most intensely affecting, that the world's history contains, I mean the offering of the poor widow, who threw her two mites into the treasury. "And he looked up, and saw the rich men casting their gifts into the treasury; and he saw also a certain poor widow casting in thither two mites. And he said, Of a truth I say unto you, that this poor widow hath cast in more than they all; for all these have, of their abundance, cast in unto the offerings of God: but she of her penury hath cast in all the living that she had." What more tender, more solemnly affecting, more profoundly pathetic, than this charity, this offering to God, of a farthing. We know nothing of her name, her family, or her tribe. We only know that she was a poor woman, and a widow, of whom there is nothing left upon record but this sublimely simple story, that when the rich came to cast their proud offerings into the treasury, this poor woman came also, and cast in her two mites, which made a farthing! And that example, thus made the subject of divine commendation, has been read, and told, and gone abroad everywhere, and sunk deep into a hundred millions

of hearts, since the commencement of the Christian era, and has done more good than could be accomplished by a thousand marble palaces, because it was charity mingled with true benevolence, given in the fear, the love, the service, and honor of God; because it was charity, that had its origin in religious feeling; because it was a gift to the honor of God!

Cases have come before the courts, of bequests, in last wills, made or given to God, without any more specific direction; and these bequests have been regarded as creating charitable uses. But can that be truly called a charity which flies in the face of all the laws of God and all the usages of Christian man? I arraign no man for mixing up a love of distinction and notoriety with his charities. I blame not Mr. Girard because he desired to raise a splendid marble palace in the neighborhood of a beautiful city, that should endure for ages, and transmit his name and fame to posterity. But his school of learning is not to be valued, because it has not the chastening influences of true religion; because it has no fragrance of the spirit of Christianity. It is not a charity, for it has not that which gives to a charity for education its chief value. It will, therefore, soothe the heart of no Christian parent, dying in poverty and distress, that those who owe to him their being may be led, and fed, and clothed by Mr. Girard's bounty, at the expense of being excluded from all the means of religious instruction afforded to other children, and shut up through the most interesting period of their lives in a seminary without religion, and with moral sentiments as cold as its own marble walls.

I now come to the consideration of the second part of this clause in the will, that is to say, the reasons assigned by Mr. Girard for making these restrictions with regard to the ministers of religion; and I say that these are much more derogatory to Christianity than the main provision itself, excluding them. He says that there are such a multitude of sects and such diversity of opinion, that he will exclude all religion and all its ministers, in order to keep the minds of the children free from clashing controversies. Now, does not this tend to subvert all belief in the utility of teaching the Christian religion to youth at all? Certainly, it is a broad and bold denial of such utility. To say that the evil resulting to youth from the differences of sects and

creeds overbalances all the benefits which the best education can give them, what is this but to say that the branches of the tree of religious knowledge are so twisted, and twined, and commingled, and all run so much into and over each other, that there is therefore no remedy but to lay the axe at the root of the tree itself? It means that, and nothing less! Now, if there be any thing more derogatory to the Christian religion than this, I should like to know what it is. In all this we see the attack upon religion itself, made on its ministers, its institutions, and its diversities. And that is the objection urged by all the lower and more vulgar schools of infidelity throughout the world. In all these schools, called schools of Rationalism in Germany, Socialism in England, and by various other names in various countries which they infest, this is the universal cant. The first step of all these philosophical moralists and regenerators of the human race is to attack the agency through which religion and Christianity are administered to man. But in this there is nothing new or original. We find the same mode of attack and remark in Paine's "Age of Reason." At page 336 he says: "The Bramin, the follower of Zoroaster, the Jew, the Mahometan, the Church of Rome, the Greek Church, the Protestant Church, split into several hundred contradictory sectaries, preaching, in some instances, damnation against each other, all cry out, 'Our holy religion!'"

We find the same view in Volney's "Ruins of Empires." Mr. Volney arrays in a sort of semicircle the different and conflicting religions of the world. "And first," says he, "surrounded by a group in various fantastic dresses, that confused mixture of violet, red, white, black, and speckled garments, with heads shaved, with tonsures, or with short hairs, with red hats, square bonnets, pointed mitres, or long beards, is the standard of the Roman Pontiff. On his right you see the Greek Pontiff, and on the left are the standards of two recent chiefs (Luther and Calvin), who, shaking off a yoke that had become tyrannical, had raised altar against altar in their reform, and wrested half of Europe from the Pope. Behind these are the subaltern sects, subdivided from the principal divisions. The Nestorians, Eutychians, Jacobites, Iconoclasts, Anabaptists, Presbyterians, Wickliffites, Osiandrians, Manicheans, Pietists, Adamites, the Contemplatives, the Quakers, the Weepers, and

a hundred others, all of distinct parties, persecuting when strong, tolerant when weak, hating each other in the name of the God of peace, forming such an exclusive heaven in a religion of universal charity, damning each other to pains without end in a future state, and realizing in this world the imaginary hell of the other."

Can it be doubted for an instant that sentiments like these are derogatory to the Christian religion? And yet on grounds and reasons *exactly these*, not *like* these, but EXACTLY these, Mr. Girard founds his excuse for excluding Christianity and its ministers from his school. He is a tame copyist, and has only raised marble walls to perpetuate and disseminate the principles of Paine and of Volney. It has been said that Mr. Girard was in a difficulty; that he was the judge and disposer of his own property. We have nothing to do with his difficulties. It has been said that he must have done as he did do, because there could be no agreement otherwise. Agreement? among whom? about what? He was at liberty to do what he pleased with his own. He had to consult no one as to what he should do in the matter. And if he had wished to establish such a charity as might obtain the especial favor of the courts of law, he had only to frame it on principles not hostile to the religion of the country.

But the learned gentleman went even further than this, and to an extent that I regretted; he said that there was as much dispute about the Bible as about any thing else in the world. No, thank God, that is not the case!

MR. BINNEY. The disputes about the meaning of words and passages; you will admit that?

Well, there is a dispute about the translation of certain words; but if this be true, there is just as much dispute about it out of Mr. Girard's institution as there would be in it. And if this plan is to be advocated and sustained, why does not every man keep his children from attending all places of public worship until they are over eighteen years of age? He says that a prudent parent keeps his child from the influence of sectarian doctrines, by which I suppose him to mean those tenets that are opposed to his own. Well, I do not know but what that plan is as likely to make bigots as it is to make any thing

else. I grant that the mind of youth should be kept pliant, and free from all undue and erroneous influences; that it should have as much play as is consistent with prudence; but put it where it can obtain the elementary principles of religious truth; at any rate, those broad and general precepts and principles which are admitted by all Christians. But here in this scheme of Mr. Girard, all sects and all creeds are denounced. And would not a prudent father rather send his child where he could get instruction under any form of the Christian religion, than where he could get none at all? There are many instances of institutions, professing one leading creed, educating youths of different sects. The Baptist college in Rhode Island receives and educates youths of all religious sects and all beliefs. The colleges all over New England differ in certain minor points of belief, and yet that is held to be no ground for excluding youth with other forms of belief, and other religious views and sentiments.

But this objection to the multitude and differences of sects is but the old story, the old infidel argument. It is notorious that there are certain great religious truths which are admitted and believed by all Christians. All believe in the existence of a God. All believe in the immortality of the soul. All believe in the responsibility, in another world, for our conduct in this. All believe in the divine authority of the New Testament. Dr. Paley says that a single word from the New Testament shuts up the mouth of human questioning, and excludes all human reasoning. And cannot all these great truths be taught to children without their minds being perplexed with clashing doctrines and sectarian controversies? Most certainly they can.

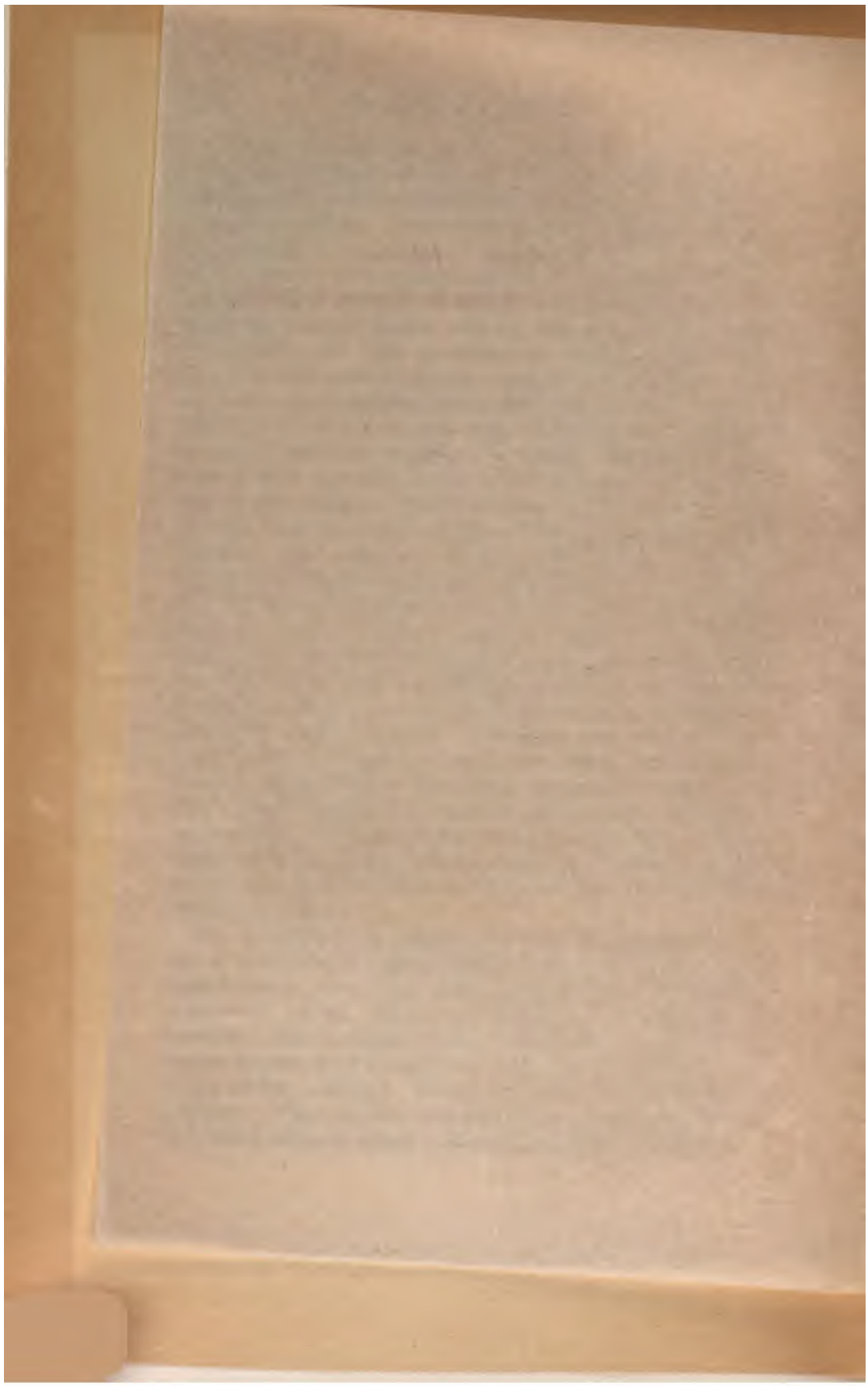
And, to compare secular with religious matters, what would become of the organization of society, what would become of man as a social being, in connection with the social system, if we applied this mode of reasoning to him in his social relations? We have a constitutional government, about the powers, and limitations, and uses of which there is a vast amount of differences of belief. Your honors have a body of laws, now before you, in relation to which differences of opinion, almost innumerable, are daily spread before the courts; in all these we see clashing doctrines and opinions advanced daily, to as great an extent as in the religious world.

Apply the reasoning advanced by Mr. Girard to human institutions, and you will tear them all up by the root; as you would inevitably tear all divine institutions up by the root, if such reasoning is to prevail. At the meeting of the first Congress there was a doubt in the minds of many of the propriety of opening the session with prayer; and the reason assigned was, as here, the great diversity of opinion and religious belief. At length Mr. Samuel Adams, with his gray hairs hanging about his shoulders, and with an impressive venerableness now seldom to be met with (I suppose owing to the difference of habits), rose in that assembly, and, with the air of a perfect Puritan, said that it did not become men, professing to be Christian men, who had come together for solemn deliberation in the hour of their extremity, to say that there was so wide a difference in their religious belief, that they could not, as one man, bow the knee in prayer to the Almighty, whose advice and assistance they hoped to obtain. Independent as he was, and an enemy to all prelacy as he was known to be, he moved that the Rev. Mr. Duché, of the Episcopal Church, should address the Throne of Grace in prayer. And John Adams, in a letter to his wife, says that he never saw a more moving spectacle. Mr. Duché read the Episcopal service of the Church of England, and then, as if moved by the occasion, he broke out into extemporaneous prayer. And those men, who were then about to resort to force to obtain their rights, were moved to tears; and floods of tears, Mr. Adams says, ran down the cheeks of the pacific Quakers who formed part of that most interesting assembly. Depend upon it, where there is a spirit of Christianity, there is a spirit which rises above forms, above ceremonies, independent of sect or creed, and the controversies of clashing doctrines.

The consolations of religion can never be administered to any of these sick and dying children in this college. It is said, indeed, that a poor, dying child can be carried out beyond the walls of the school. He can be carried out to a hostelry, or hovel, and there receive those rites of the Christian religion which cannot be performed within those walls, even in his dying hour! Is not all this shocking? What a stricture is it upon this whole scheme! What an utter condemnation! A dying youth cannot receive religious solace within this seminary of learning!

Samuel Adams

Engraved by H. B. Hall from the Painting by Johnston



But, it is asked, what could Mr. Girard have done? He could have done, as has been done in Lombardy by the Emperor of Austria, as my learned friend has informed us, where, on a large scale, the principle is established of teaching the elementary principles of the Christian religion, of enforcing human duties by divine obligations, and carefully abstaining in all cases from interfering with sects or the inculcation of sectarian doctrines. How have they done in the schools of New England? There, as far as I am acquainted with them, the great elements of Christian truth are taught in every school. The Scriptures are read, their authority taught and enforced, their evidences explained, and prayers usually offered.

The truth is, that those who really value Christianity, and believe in its importance, not only to the spiritual welfare of man, but to the safety and prosperity of human society, rejoice that in its revelations and its teachings there is so much which mounts above controversy, and stands on universal acknowledgment. While many things about it are disputed or are dark, they still plainly see its foundation, and its main pillars; and they behold in it a sacred structure, rising up to the heavens. They wish its general principles, and all its great truths, to be spread over the whole earth. But those who do not value Christianity, nor believe in its importance to society or individuals, cavil about sects and schisms, and ring monotonous changes upon the shallow and so often refuted objections founded on alleged variety of discordant creeds and clashing doctrines.

I shall close this part of my argument by reading extracts from an English writer, one of the most profound thinkers of the age, a friend of reformation in the government and laws, John Foster, the friend and associate of Robert Hall. Looking forward to the abolition of the present dynasties of the Old World, and desirous to see how the order and welfare of society is to be preserved in the absence of present conservative principles, he says: —

"Undoubtedly the zealous friends of popular education account knowledge valuable absolutely, as being the apprehension of things as they are; a prevention of delusions; and so far a fitness for right volitions. But they consider religion (besides being itself the primary and infinitely the most important part of knowledge) as a principle indispen-

sable for securing the full benefit of all the rest. It is desired, and endeavored, that the understandings of these opening minds may be taken possession of by just and solemn ideas of their relation to the Eternal Almighty Being; that they may be taught to apprehend it as an awful reality, that they are perpetually under his inspection; and, as a certainty, that they must at length appear before him in judgment, and find in another life the consequences of what they are in spirit and conduct here. It is to be impressed on them, that his will is the supreme law, that his declarations are the most momentous truth known on earth, and his favor and condemnation the greatest good and evil. Under an ascendency of this divine wisdom it is, that their discipline in any other knowledge is designed to be conducted; so that nothing in the mode of their instruction may have a tendency contrary to it, and every thing be taught in a manner recognizing the relation with it, as far as shall consist with a natural, unforced way of keeping the relation in view. Thus it is sought to be secured, that, as the pupil's mind grows stronger, and multiplies its resources, and he therefore has necessarily more power and means for what is wrong, there may be luminously presented to him, as if celestial eyes visibly beamed upon him, the most solemn ideas that can enforce what is right.

"Such is the discipline meditated for preparing the subordinate classes to pursue their individual welfare, and act their part as members of the community. . . . . .

"All this is to be taught, in many instances directly, in others by reference for confirmation, from the Holy Scriptures, from which authority will also be impressed, all the while, the principles of religion. And religion, while its grand concern is with the state of the soul towards God and eternal interests, yet takes every principle and rule of morals under its peremptory sanction; making the primary obligation and responsibility be towards God, of every thing that is a duty with respect to men. So that, with the subjects of this education, the sense of *propriety* shall be *conscience;* the consideration of how they ought to be regulated in their conduct as a part of the community shall be the recollection that their Master in heaven dictates the laws of that conduct, and will judicially hold them amenable for every part of it.

"And is not a discipline thus addressed to the purpose of fixing religious principles in ascendency, as far as that difficult object is within the power of discipline, and of infusing a salutary tincture of them into whatever else is taught, the right way to bring up citizens faithful to all that deserves fidelity in the social compact? . . . . .

"Lay hold on the myriads of juvenile spirits before they have time to grow up, through ignorance, into a reckless hostility to social order; train them to sense and good morals; inculcate the principles of re-

ligion, simply and solemnly, *as* religion, as a thing directly of divine dictation, and not as if its authority were chiefly in virtue of human institutions; let the higher orders, generally, make it evident to the multitude that they are desirous to raise them in value, and promote their happiness; and then, *whatever* the demands of the people as a body, thus improving in understanding and sense of justice, shall come to be, and *whatever* modification their preponderance may ultimately enforce on the great social arrangements, it will be infallibly certain that there never *can* be a love of disorder, an insolent anarchy, a prevailing spirit of revenge and devastation. Such a conduct of the ascendant ranks would, in this nation at least, secure that, as long as the world lasts, there never would be any formidable commotion, or violent sudden changes. All those modifications of the national economy to which an improving people would aspire, and would deserve to obtain, would be gradually accomplished, in a manner by which no party would be wronged, and all would be the happier." *

I not only read this for the excellence of its sentiments and their application to the subject, but because they are the results of the profound meditations of a man who is dealing with popular ignorance. Desirous of, and expecting, a great change in the social system of the Old World, he is anxious to discover that conservative principle by which society can be kept together when crowns and mitres shall have no more influence. And he says that the only conservative principle must be, and is, RELIGION! the authority of God! his revealed will! and the influence of the teaching of the ministers of Christianity!

Mr. Webster here stated that he would, on Monday, bring forward certain references and legal points bearing on this view of the case.

The court then adjourned.

SECOND DAY.

The seven judges all took their seats at eleven o'clock, and the court was opened.

Mr. Binney observed to the court, that he had omitted to notice, in his argument, that, in regard to the statutes of Uniformity and Toleration in England, whilst the Jewish Talmuds for the propagation of Judaism alone were not sustained by those statutes, yet the Jewish Talmuds for the maintenance of the poor were sustained thereby. And the decisions show that, where a gift had for its object the maintenance and edu-

* Foster's Essay on the Evils of Popular Ignorance, Section IV.

cation of poor Jewish children, the statutes sustained the devise. In proof of this he quoted 1 Ambler, by Blunt, p. 228, case of De Costa, &c. Also, the case of Jacobs *v.* Gomperte, in the notes. Also, in the notes, 2 Swanston, p. 487, same case of De Costa, &c. Also, 7 Vesey, p. 423, case of Mo Catto *v.* Lucardo. Also, Sheppard, p. 107, and Boyle, p. 43.

Another case was that of a bequest given to an object abroad, and in the decision the Master of the Rolls considered that religious instruction was not a necessary part of education. See, also, the case of The Attorney-General *v.* The Dean and Canons of Christ Church, Jacobs, p. 485.

Mr. Binney then quoted from Noah Webster the definition of the word "tenets," to show that Mr. Webster did not give the right definition when he said that "tenets" meant "religion."

Mr. Webster then rose and said:—

The arguments of my learned friend, may it please your honors, in relation to the Jewish laws as tolerated by the statutes, go to maintain my very proposition; that is, that no school for the instruction of youth in any system which is in any way derogatory to the Christian religion, or for the teaching of doctrines that are in any way contrary to the Christian religion, is, or ever was, regarded as a charity by the courts. It is true that the statutes of Toleration regarded a devise for the maintenance of poor Jewish children, to give them food and raiment and lodging, as a charity. But a devise for the teaching of the Jewish religion to poor children, that should come into the Court of Chancery, would not be regarded as a charity, or entitled to any peculiar privileges from the court.

When I stated to your honors, in the course of my argument on Saturday, that all denominations of Christians had some mode or provision for the appointment of teachers of Christianity amongst them, I meant to have said something about the Quakers. Although we know that the teachers among them come into their office in a somewhat peculiar manner, yet there are preachers and teachers of Christianity provided in that peculiar body, notwithstanding its objection to the mode of appointing teachers and preachers by other Christian sects. The place or character of a Quaker preacher is an office and appointment as well known as that of a preacher among any other denomination of Christians.

I have heretofore argued to show that the Christian religion,

its general principles, must ever be regarded among us as the foundation of civil society; and I have thus far confined my remarks to the tendency and effect of the scheme of Mr. Girard (if carried out) upon the Christian religion. But I will go farther, and say that this school, this scheme or system, in its tendencies and effects, is opposed to all religions, of every kind. I will not now enter into a controversy with my learned friend about the word "tenets," whether it signify opinions or dogmas, or whatever you please. Religious tenets, I take it, and I suppose it will be generally conceded, mean religious opinions; and if a youth has arrived at the age of eighteen, and has no religious tenets, it is very plain that he has no religion. I do not care whether you call them dogmas, tenets, or opinions. If the youth does not entertain dogmas, tenets, or opinions, or opinions, tenets, or dogmas, on religious subjects, then he has no religion at all. And this strikes at a broader principle than when you merely look at this school in its effect upon Christianity alone. We will suppose the case of a youth of eighteen, who has just left this school, and has gone through an education of philosophical morality, precisely in accordance with the views and expressed wishes of the donor. He comes then into the world to choose his religious tenets. The very next day, perhaps, after leaving school, he comes into a court of law to give testimony as a witness. Sir, I protest that by such a system he would be disfranchised. He is asked, "What is your religion?" His reply is, "O, I have not yet chosen any; I am going to look round, and see which suits me best." He is asked, "Are you a Christian?" He replies, "That involves religious tenets, and as yet I have not been allowed to entertain any." Again, "Do you believe in a future state of rewards and punishments?" And he answers, "That involves sectarian controversies, which have carefully been kept from me." "Do you believe in the existence of a God?" He answers, that there are clashing doctrines involved in these things, which he has been taught to have nothing to do with; that the belief in the existence of a God, being one of the first questions in religion, he is shortly about to think of that proposition. Why Sir, it is vain to talk about the destructive tendency of such a system; to argue upon it is to insult the understanding of every man; *it is mere, sheer, low, ribald, vulgar*

*deism and infidelity!** It opposes all that is in heaven, and all on earth that is worth being on earth. It destroys the connecting link between the creature and the Creator; it opposes that great system of universal benevolence and goodness that binds man to his Maker. *No religion till he is eighteen!* What would be the condition of all our families, of all our children, if religious fathers and religious mothers were to teach their sons and daughters no religious tenets till they were eighteen? What would become of their morals, their character, their purity of heart and life, their hope for time and eternity? What would become of all those thousand ties of sweetness, benevolence, love, and Christian feeling, that now render our young men and young maidens like comely plants growing up by a streamlet's side; the graces and the grace of opening manhood, of blossoming womanhood? What would become of all that now renders the social circle lovely and beloved? What would become of society itself? How could it exist? And is that to be considered a charity which strikes at the root of all this; which subverts all the excellence and the charms of social life; which tends to destroy the very foundation and framework of society, both in its practices and in its opinions; which subverts the whole decency, the whole morality, as well as the whole Christianity and government, of society? No, Sir! no, Sir!

And here let me turn to the consideration of the question, What is an oath? I do not mean in the variety of definitions that may be given to it as it existed and was practised in the time of the Romans, but an oath as it exists at present in our courts of law; as it is founded on a degree of consciousness that there is a Power above us that will reward our virtues and punish our vices. We all know that the doctrine of the English law is, that in the case of every person who enters court as a witness, be he Christian or Hindoo, there must be a firm conviction on his mind that falsehood or perjury will be punished, either in this world or the next, or he cannot be admitted as a witness. If he has not this belief, he is disfranchised. In proof of this, I refer your honors to the great case of Ormichund against Barker, in Lord Chief Justice Wills's report.

* The effect of this remark was almost electric, and some one in the court-room broke out in applause.

There this doctrine is clearly laid down. But in no case is a man allowed to be a witness that has no belief in future rewards and punishments for virtues or vices, nor ought he to be. We hold life, liberty, and property in this country upon a system of oaths; oaths founded on a religious belief of some sort. And that system which would strike away the great substratum, destroy the safe possession of life, liberty, and property, destroy all the institutions of civil society, cannot and will not be considered as entitled to the protection of a court of equity. It has been said, on the other side, that there was no teaching *against* religion or Christianity in this system. I deny it. The whole testament is one bold proclamation against Christianity and religion of every creed. The children are to be brought up in the principles declared in that testament. They are to learn to be suspicious of Christianity and religion; to keep clear of it, that their youthful heart may not become susceptible of the influences of Christianity or religion in the slightest degree. They are to be told and taught that religion is not a matter for the heart or conscience, but for the decision of the cool judgment of mature years; that at that period when the whole Christian world deem it most desirable to instil the chastening influences of Christianity into the tender and comparatively pure mind and heart of the child, ere the cares and corruptions of the world have reached and seared it, at that period the child in this college is to be carefully excluded therefrom, and to be told that its influence is pernicious and dangerous in the extreme. Why, the whole system is a constant preaching against Christianity and against religion, and I insist that there is no charity, and can be no charity, in that system of instruction from which Christianity is excluded. I perfectly agree with what my learned friend says in regard to the monasteries of the Old World, as seats of learning to which we are all indebted at the present day. Much of our learning, almost all of our early histories, and a vast amount of literary treasure, were preserved therein and emanated therefrom. But we all know, that although these were emphatically receptacles for literature of the highest order, yet they were always connected with Christianity, and were always regarded and conducted as religious establishments.

Going back as far as the statutes of Henry the Fourth,

as early as 1402,* in the act respecting charities, we find that one hundred years before the Reformation, in Catholic times, in the establishment of every charitable institution, there was to be proper provision for religious instruction. Again, after the time of the Reformation, when those monastic institutions were abolished, in the 1st Edw. VI. ch. 14, we find certain *chantries* abolished, and their funds appropriated to the instruction of youth in the grammar schools founded in that reign, which Lord Eldon says extended all over the kingdom. In all these we find provision for religious instruction, the dispensation of the same being by a teacher or preacher. In 2 Swanston, p. 529, the case of the Bedford Charity, Lord Eldon gives a long opinion, in the course of which he says, that in these schools care is taken to educate youth in the Christian religion, and in all of them the New Testament is taught, both in Latin and Greek. Here, then, we find that the great and leading provision, both before and after the Reformation, was to connect the knowledge of Christianity with human letters. And it will be always found that a school for instruction of youth, to possess the privileges of a charity, must be provided with religious instruction.

For the decision, that the essentials of Christianity are part of the common law of the land, I refer your honors to 1 Vernon, p. 293, where Lord Hale, who cannot be suspected of any bigotry on this subject, says, that to decry religion, and call it a cheat, tends to destroy all religion; and he also declares Christianity to be part of the common law of the land. Mr. N. Dane, in his Abridgment, ch. 219, recognizes the same principle. In 2 Strange, p. 834, case of The King *v.* Wilson, the judges would not suffer it to be debated that writing against religion generally is an offence at common law. They laid stress upon the word "generally," because there might arise differences of opinion between religious writers on points of doctrine, and so forth. So in Taylor's case, 3 Merivale, p. 405, by the High Court of Chancery, these doctrines were recognized and maintained. The same doctrine is laid down in 2 Burn's Ecclesiastical Law, p. 95, Evans *v.* The Chamberlain of London; and in 2 Russell, p. 501, The Attorney-General *v.* The Earl of Mansfield.

* 2 Pickering, p. 433.

There is a case of recent date, which, if the English law is to prevail, would seem conclusive as to the character of this devise. It is the case of The Attorney-General *v.* Cullum, 1 Younge and Collyer's Reports, p. 411. The case was heard and decided in 1842, by Sir Knight Bruce, Vice-Chancellor. The reporter's abstract, or summary, of the decision is this: "COURTS OF EQUITY, IN THIS COUNTRY, WILL NOT SANCTION ANY SYSTEM OF EDUCATION IN WHICH RELIGION IS NOT INCLUDED."

The charity in question in that case was established in the reign of Edward the Fourth, for the benefit of the community and poor inhabitants of the town of Bury St. Edmunds. The objects of the charity were various: for relief of prisoners, educating and instructing poor people, for food and raiment for the aged and impotent, and others of the same kind. There were uses, also, now deemed superstitious, such as praying for the souls of the dead. In this, and in other respects, the charity required revision, to suit it to the habits and requirements of modern times; and a scheme was accordingly set forth for such revision by the master, under the direction of the court. By this scheme there were to be schools, and these schools were to be closed on Sundays, although the Scriptures were to be read daily on other days. This was objected to, and it was insisted, on the other hand, that the masters and mistresses of the schools should be members of the Church of England; that they should, on every Lord's day, give instruction in the doctrines of the Church to those children whose parents might so desire; but that all the scholars should be required to attend public worship every Lord's day in the parish church, *or other place of worship, according to their respective creeds.*

The Vice-Chancellor said, that the term "education" was properly understood, by all the parties, to comprehend religious instruction; that the objection to the scheme proposed by the master was not that it did not provide for religious instruction according to the doctrines of the Church of England, but that it did not provide for religious instruction at all. In the course of the hearing, the Vice-Chancellor said, that any scheme of education, without religion, would be worse than a mockery. The parties afterwards agreed, that the masters and mistresses should be members of the Church of England; that every school day the master should give religious instruction, during one hour, to

all the scholars, *such religious instruction to be confined to the reading and explanation of the Scriptures;* that on every Lord's day he should give instruction in the liturgy, catechism, and articles of the Church of England, and that the scholars should attend church every Lord's day, *unless they were children of persons not in communion with the Church of England.* In giving the sanction of the court to this arrangement, the Vice-Chancellor said, that he wished to have it distinctly understood that the ground on which he had proceeded was not a preference of one form of religion to another, but the necessity, if the matter was left to him judicially, to adopt the course of requiring the teachers to be members of the Church of England.

This case clearly shows, that, at the present day, a school, founded by a charity, for the instruction of children, cannot be sanctioned by the courts as a charity, unless the scheme of education includes religious instruction. It shows, too, that this general requisition of the law is independent of a church establishment, and that it is not religion in any particular form, but religion, religious and Christian instruction in some form, which is held to be indispensable. It cannot be doubted how a charity for the instruction of children would fare in an English court, the scheme of which should carefully and sedulously exclude all religious or Christian instruction, and profess to establish morals on principles no higher than those of enlightened Paganism.

Enough, then, your honors, has been said on this point; and I am willing that inquiry should be prosecuted to any extent of research to controvert this position, that a school of education for the young, which rejects the Christian religion, cannot be sustained as a charity, so as to entitle it to come before the courts of equity for the privileges which they have power to confer on charitable bequests.

Mr. Webster then replied to the remarks of Mr. Binney, in relation to the Liverpool Blue Coat School, and read from the report of Mr. Bache on education in Europe, Mr. Bache having been sent abroad by the city of Philadelphia to investigate this whole matter of education.

If Mr. Girard had established such a school as that, it would have been free from all those objections that have been raised against it This Liverpool Blue Coat School, though too much

of a religious party character, is strictly a church establishment. It is a school established on a peculiar foundation, that of the Madras system of Dr. Bell. It is a monitorial school; those who are advanced in learning are to teach the others in religion, as well as secular knowledge. It is strictly a religious school, and the only objection is, that in its instruction it is too much confined to a particular sect.

Mr. Binney observed that there was no provision made for clergymen.

That is true, because the scheme of the school is monitorial, in which the more advanced scholars instruct the others. But religious instruction is amply and particularly provided for.

Mr. Webster then referred to Shelford, p. 105, and onward, under the head "Jews," in the fourth paragraph, where, he stated, the whole matter, and all the cases, as regarded the condition and position of the Jews respecting various charities, were given in full.

He then referred to the Smithsonian legacy, which had been mentioned, and which he said was no charity at all, nor any thing like a charity. It was a gift to Congress, to be disposed of as Congress saw fit, for scientific purposes.

He then replied, in a few words, to the arguments of Mr. Binney in relation to the University of Virginia; and said that, although there was no provision for religious instruction in that University, yet he supposed it would not be contended for a moment that the University of Virginia was a charity, or that it came before the courts claiming of the law of that State protection as such. It stood on its charter.

I repeat again, before closing this part of my argument, the proposition, important as I believe it to be, for your honors' consideration, that the proposed school, in its true character, objects, and tendencies, is derogatory to Christianity and religion. If it be so, then I maintain that it cannot be considered a charity, and as such entitled to the just protection and support of a court of equity. I consider this the great question for the consideration of this court. I may be excused for pressing it on the attention of your honors. It is one which, in its decision, is to influence the happiness, the temporal and the eternal welfare, of one hundred millions of human beings, alive and to be born, in this land. Its decision will give a hue to the apparent character of our institutions; it will be a comment on their spirit to the whole Christian world. I again press the question

to your honors: *Is a clear, plain, positive system for the instruction of children, founded on clear and plain objects of infidelity, a charity in the eye of the law, and as such entitled to the privileges awarded to charities in a court of equity?* And with this, I leave this part of the case.

THIRD DAY.

I shall now, may it please your honors, proceed to inquire whether there is, in the State of Pennsylvania, any settled public policy to which this school, as planned by Mr. Girard in his will, is in opposition; for it follows, that, if there be any settled public policy in the laws of Pennsylvania on this subject, then any school, or scheme, or system, which tends to subvert this public policy, cannot be entitled to the protection of a court of equity. It will not be denied that there is a general public policy in that, as in all States, drawn from its history and its laws. And it will not be denied that any scheme or school of education which directly opposes this is not to be favored by the courts. Pennsylvania is a free and independent State. She has a popular government, a system of trial by jury, of free suffrage, of vote by ballot, of alienability of property. All these form part of the general public policy of Pennsylvania. Any man who shall go into that State can speak and write as much as he pleases against a popular form of government, freedom of suffrage, trial by jury, and against any or all of the institutions just named; he may decry civil liberty, and assert the divine right of kings, and still he does nothing criminal; but if, to give success to such efforts, special power from a court of justice is required, it will not be granted to him. There is not one of these features of the general public policy of Pennsylvania against which a school might not be established and preachers and teachers employed to teach. That might in a certain sense be considered a school of education, but it would not be a charity. And if Mr. Girard, in his lifetime, had founded schools and employed teachers to preach and teach in favor of infidelity, or against popular government, free suffrage, trial by jury, or the alienability of property, there was nothing to stop him or prevent him from so doing. But where any one or all of these come to be provided for a school or system as a charity, and

come before the courts for favor, then in neither one, nor all, nor any, can they be favored, because they are opposed to the general public policy and public law of the State.

These great principles have always been recognized; and they are no more part and parcel of the public law of Pennsylvania than is the Christian religion. We have in the charter of Pennsylvania, as prepared by its great founder, William Penn, we have in his "great law," as it was called, the declaration, that the preservation of Christianity is one of the great and leading ends of government. This is declared in the charter of the State. Then the laws of Pennsylvania, the statutes against blasphemy, the violation of the Lord's day, and others to the same effect, proceed on this great, broad principle, that the preservation of Christianity is one of the main ends of government. This is the general public policy of Pennsylvania. On this head we have the case of Updegraph *v.* The Commonwealth,* in which a decision in accordance with this whole doctrine was given by the Supreme Court of Pennsylvania. The solemn opinion pronounced by that tribunal begins by a general declaration that Christianity is, and has always been, part of the common law of Pennsylvania.†

I have said, your honors, that our system of oaths in all our courts, by which we hold liberty and property, and all our rights, is founded on or rests on Christianity and a religious belief. In like manner the affirmation of Quakers rests on religious scruples drawn from the same source, the same feeling of religious responsibility.

The courts of Pennsylvania have themselves decided that a charitable bequest, which counteracts the public policy of the State, cannot be sustained. This was so ruled in the often cited case of the Methodist Church *v.* Remington. There, the devise was to the Methodist Church generally, extending through the States and into Canada, and the trust was declared void on this account alone; namely, that it was inconsistent with the public policy of the State, inconsistent with the general spirit of the laws of Pennsylvania. But is there any comparison to be made between that ground on which a devise to a church is declared void, namely, as inconsistent with the public policy

* 11 Sergeant & Rawle, p. 394. † See Appendix, No. II.

of the State, and the case of a devise which undermines and opposes the whole Christian religion, and derides all its ministers; the one tending to destroy all religion, and the other being merely against the spirit of the legislation and laws of the State, and the general public policy of government, in a very subordinate matter? Can it be shown that this devise of a piece of ground to the Methodist Church can be properly set aside, and declared void on general grounds, and not be shown that such a devise as that of Mr. Girard, which tends to overturn as well as oppose the public policy and laws of Pennsylvania, can also be set aside?

Sir, there are many other American cases which I could cite to the court in support of this point of the case. I will now only refer to 8 Johnson, page 291.

It is the same in Pennsylvania as elsewhere, the general principles and public policy are sometimes established by constitutional provisions, sometimes by legislative enactments, sometimes by judicial decisions, and sometimes by general consent. But however they may be established, there is nothing that we look for with more certainty than this general principle, that Christianity is part of the law of the land. This was the case among the Puritans of New England, the Episcopalians of the Southern States, the Pennsylvania Quakers, the Baptists, the mass of the followers of Whitefield and Wesley, and the Presbyterians; all brought and all adopted this great truth, and all have sustained it. And where there is any religious sentiment amongst men at all, this sentiment incorporates itself with the law. *Every thing declares it.* The massive cathedral of the Catholic; the Episcopalian church, with its lofty spire pointing heavenward; the plain temple of the Quaker; the log church of the hardy pioneer of the wilderness; the mementoes and memorials around and about us; the consecrated graveyards, their tombstones and epitaphs, their silent vaults, their mouldering contents; all attest it. *The dead prove it as well as the living.* The generation that are gone before speak to it, and pronounce it from the tomb. We feel it. All, all, proclaim that Christianity, general, tolerant Christianity, Christianity independent of sects and parties, that Christianity to which the sword and the fagot are unknown, general, tolerant Christianity, is the law of the land.

Mr. Webster, having gone over the other points in the case, which were of a more technical character, in conclusion, said: —

I now take leave of this cause. I look for no good whatever from the establishment of this school, this college, this scheme, this experiment of an education in "practical morality," unblessed by the influences of religion. It sometimes happens to man to attain by accident that which he could not achieve by long-continued exercise of industry and ability. And it is said even of the man of genius, that by chance he will sometimes "snatch a grace beyond the reach of art." And I believe that men sometimes do mischief, not only beyond their intent, but beyond the ordinary scope of their talents and ability. In my opinion, if Mr. Girard had given years to the study of a mode by which he could dispose of his vast fortune so that no good could arise to the general cause of charity, no good to the general cause of learning, no good to human society, and which should be most productive of protracted struggles, troubles, and difficulties in the popular counsels of a great city, he could not so effectually have attained that result as he has by this devise now before the court. It is not the result of good fortunes, but of bad fortunes, which have overridden and cast down whatever of good might have been accomplished by a different disposition. I believe that this plan, this scheme, was unblessed in all its purposes, and in all its original plans. Unwise in all its frame and theory, while it lives it will lead an annoyed and troubled life, and leave an unblessed memory when it dies. If I could persuade myself that this court would come to such a decision as, in my opinion, the public good and the law require, and if I could believe that any humble efforts of my own had contributed in the least to lead to such a result, I should deem it the crowning mercy of my professional life.

Appendix

No. I. — Page 146.

Extract from the Writings of Bishop White.

THE will goes to the extent of the abandonment of religion, as prescribing the rules of human conduct. If a collection of youth may have their attention exclusively directed to other motives, no reason can be given why they may not be surrendered to the same through life. If the instructors are forbidden to call the attention of their pupils to the Author of all the wonders which open on their senses, and to a state succeeding that which, as they must soon discover, will be ended by the grave (and certainly silence on these and on the like subjects is exacted by the terms of the bequest); and if the prescribed rule of life be sufficient until the age of fourteen or fifteen, or even of eighteen, long before which there will be felt the struggles between inclination and the sense of duty; the sufficiency of the same rule for the remainder of life is an obvious consequence.

The error of Mr. Girard's restrictions is evident in the principle on which it is founded, the diversity of sentiment on subjects of religion. Let the principle be tested in application to the relations of domestic life. No wise head of a family withholds instruction from his children on the reciprocal duties of parent and child, and of the parties to a marriage contract. Yet how many shades of difference of opinion are there as to the proper extent of parental power, and as to that of the correspondent obedience of the child? Similar diversities prevail as to the other relations. Is sage instruction to be delayed on these accounts?

The like remark may be made on the subject of civil rulers, and of the allegiance due from the citizen or subject. What a wide field is open by the claims of power in the hands of a single person, or in those of a few, or in an aristocracy, or in a popular assembly, or in some one of the many mixed forms which have been either adopted or imagined! According to the reasoning of the will, all determination should be deferred to the ages of fourteen or fifteen, or perhaps eighteen; yet, in disregard of such laxity, every good citizen instils into the minds of his offspring sentiments which sustain the rights of those who govern, and exact obedience within the limits of the laws.

The present writer has a very limited acquaintance with the gentlemen who compose the respectable bodies of our city councils. He supposes of the most, and thinks it probable of all of them, that they confess the claims of religion, by denominating themselves as belonging, each of them, to one or to another of the religious societies within the bounds of the city. He therefore, with great respect, submits to their understandings how far they can, with clear consciences, undertake the government of a seminary which discharges its pupils from all regard to religious obligation, and from all subjection to religious discipline. They cannot but be aware of the contrariety of so ungodly a regimen to those Holy Scriptures which they make the foundation of their several creeds. In the Old Testament they read, "Bring up a child in the way in which he should go." They cannot be ignorant of what the Jewish lawgiver says concerning the laws of God: "Thou shalt diligently teach them to thy children, and thou shalt talk of them when thou sittest in thy house, and when thou walkest by the way, and when thou liest down, and when thou risest up." And, if moral cultivation be a part of the plan of any literary institution, it cannot be beyond the reach of the caution, "The fear of the Lord is the beginning of wisdom." The calls of the New Testament are in unison with those of the Old: "Ye parents, bring up your children in the nurture and admonition of the Lord"; "Children, obey your parents in the Lord"; and, "I write unto you, little children, because ye have known the Father." Very different are these and the like provisions from the delay of even the mention of such sanctions of duty to young men under the ages of fourteen or fifteen, or towards eighteen, whatever need there may be seen of them in the increasing strength of their passions and of their appetites.

Let there be attention to the operation of the bequest in its occasional violation of the tenderest feelings of the parental breast. We will suppose four religious men, an Episcopalian, a Presbyterian, a Baptist, and a Methodist, in circumstances barely competent to the subsistence of their families. Let them perceive themselves departing this life, without provision for the support and the education of their children; and no other guardianship over them to be relied on, besides that of certain functionaries of the city, wisely provided for the object. These guardians may judge the binding of them to reputable tradesmen to have less prospect of advantage than the entering of them into the contemplated receptacle of orphans. According to the character of the supposed dying men, notwithstanding the diversities of their opinions on various points, they would be the same in the design, had their lives been spared, of giving a religious education to their children; whose deaths they would deem a less calamity than their being thrown on a

world of temptation at the age of fourteen, or fifteen, or eighteen, without the knowledge of God or of a future state, or of those Scriptures which, in the parental estimate, are necessary to their being made "wise unto salvation." A great proportion of the children of the poor are disposed of under a guardianship created by the laws. This will probably be the principal source of supply to a seminary in which the sound of the voice of religion is never to reach the ears of the juvenile inmates.

It would be unjust to the memory of Mr. Girard not to notice his remarking it as a privilege of his orphans, on their arrival at the age for the leaving of the seminary, to adopt such tenets as their matured reason may enable them to prefer. It is not to the purpose to inquire how far this privilege which his *protégés* will derive from the laws of the land may be supposed to add to or enforce the moral education which they may have brought with them from the seminary. Whatever may have been, or may not have been, the wishes of the testator on this point, and whatever effect our favorable construing of his views may have on our estimate of his own character, it is all foreign to the present argument, which tends to the two positions, that it is irreligious and unchristian to accept of the public responsibility of an institution, to the pupils of which there shall be denied all instruction in religion; and that, if other motives are sufficient for their government until their arrival at the ages of fourteen and fifteen and eighteen, no reason can be given why they may not be sufficient through the remainder of life.

Perhaps there may seem an interference of the argument with a prejudice not uncommon, that the minds of the secluded orphans would be sensible of impressions made on them by nature of the being of God, and of their responsibility to his tribunal. This is the exploded doctrine of innate ideas. If there be any not yet reached by what has been written on the subject by John Locke, they may be referred to the observations lately made on those born deaf and dumb; who know nothing of the primary truths of religion, until taught through the medium of the expedients brought into operation for that unfortunate class of the human family. Whether the design of Mr. Girard can be strictly executed, may be considered as a problem. Should this be the case, his orphans will leave the seat of their juvenile residence as void of any trace of a knowledge of the Deity, as some who might be shown to him in an institution which in his will he has properly distinguished by a munificent donation.

It is required that for admission the orphan shall be between six and ten years of age. Doubtless, within those terms, there are sometimes salutary impressions on infant minds. Where this has been the case, it is not probable that a single trace of them will remain through years, in a sphere so unfavorable to their cultivation.

It may be anticipated as very unlikely, that for the intended seminary there will be obtained, even if it should be thought desirable, instructors who are believers in the Christian religion, and who have its interests at heart. Were this possible, it is easy to perceive the painful circumstances in which such instructors must sometimes find themselves. Let an instructor be supposed taking a walk with one of the pupils, on some fine morning during the renewal of the herbage of the year. Let there arise in the mind of the former some such passage as the address to the Deity, in Adam's Morning Hymn, in Milton: "These are thy wondrous works, Parent of good!" The instructor, warmed by the theme and the surrounding scene, might be tempted to break out in such an act of adoration. But it would be unfaithfulness to his trust, and he must keep it a secret from his pupil that he believes in the existence of such a being. The supposition might be diversified by a great variety of cases, sufficient to show that, under the provisions of the will, there will be an interdict of Christian instructors, whether designed or not, as well as of Christian teaching, within the walls.

That there will be a supply of teachers of a very different description, may be counted on; and modern times have multiplied those pests of society who, under the profession of schoolmasters, lose no opportunities of infusing their poison of infidelity into unsuspicious minds. Such instructors have no authority, under the will, to go beyond the lessons of mere morality, so as to teach any doctrine of absolute irreligion, from the highest point of atheism to the most specious of all the expedients for the misrepresentation of any of the contents of Holy Scripture. But no one, acquainted with human nature, will believe that such instructors, in teaching, will find reluctance to the guarding of their pupils against the religious truths which will be addressed to them on their entrance into social life, resolving what they will hear into popular fable and superstition, which it is now high time to lay aside.

From the tenor of the argument, there will have been anticipated the opinion of what should be expected from city councils. It is, that there should be a respectful, but determined, rejection of the trust intended to be instituted by the will of Stephen Girard, Esq., for tne maintaining and educating of orphans.

It is a great sacrifice, but it cannot be too great, when the acceptance of it would be an acknowledgment that religion, even in its simplest forms, is unnecessary to the binding of men to their various duties. As yet, no such theory has shown its face in the proceedings of any of the constituted authorities of the United States. If the breaking of this unholy ground should be a corporate act of our city councils, there will be apprehended from it the most disastrous consequences, by

A Citizen of Philadelphia.

No. II. — p. 175.

Extract from the Judgment of the Supreme Court of Pennsylvania, in the Case of Updegraph v. *The Commonwealth.*

Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; Christianity, without the spiritual artillery of European countries; for this Christianity was one of the considerations of the royal charter, and the very basis of its great founder, William Penn; not Christianity founded on any particular religious tenets; not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men. William Penn and Lord Baltimore were the first legislators who passed laws in favor of liberty of conscience; for before that period the principle of liberty of conscience appeared in the laws of no people, the axiom of no government, the institutes of no society, and scarcely in the temper of any man. Even the Reformers were as furious against contumacious errors, as they were loud in asserting the liberty of conscience. And to the wilds of America, peopled by a stock cut off by persecution from a Christian society, does Christianity owe true freedom of religious opinion and religious worship. . . . . .

From the time of Bracton, Christianity has been received as a part of the common law of England. I will not go back to remote periods, but state a series of prominent decisions, in which the doctrine is to be found. . . . . .

In the case of the King *v.* Woolaston, (2 Stra., 844; Fitzg., 64; Raymond, 162,) the defendant had been convicted of publishing five libels, ridiculing the miracles of Jesus Christ, his life and conversation, and it was moved in arrest of judgment, that this offence was not punishable in the temporal courts; but the court said they would not suffer it to be debated "whether to write against Christianity generally was not an offence of temporal cognizance." It was further contended, that it was merely to show that those miracles were not to be taken in a literal, but allegorical sense, and therefore the book could not be aimed at Christianity in general, but merely attacking one proof of the Divine mission. But the court said the main design of the book, though professing to establish Christianity upon a true bottom, considers the narrations of Scripture as explanative and prophetical, yet that these professions could not be credited, and the rule is, *allegatio contra factum non est admittendum.* In that case the court laid great stress on the term *general*, and did not intend to include disputes between learned men on particular and controverted points; and Lord Chief Justice Raymond (Fitzg., 66) said: "I would have it taken notice of, that we do not meddle with

the difference of opinion, and that we interfere only where the root of Christianity is struck at." . . . . .

In the justly admired speech of Lord Mansfield, in a case which made much noise at the time (Evens *v.* Chamberlain of London, Furneaux's Letters to Sir W. Blackstone, App. to Black. Com., and 2 Burn's Eccles. Law, p. 95), conscience, he observed, is not controllable by human laws, nor amenable to human tribunals; persecution, or attempts to force conscience, will never produce conviction, and are only calculated to make hypocrites or martyrs. There never was a single instance, from the Saxon times down to our own, in which a man was punished for erroneous opinions. For atheism, blasphemy, and reviling the Christian religion, there have been instances of prosecution at the common law; but bare non-conformity is no sin by the common law, and all pains and penalties for non-conformity to the established rites and modes are repealed by the acts of toleration, and Dissenters exempted from ecclesiastical censures. What bloodshed and confusion have been occasioned, from the reign of Henry the Fourth, when the first penal statutes were enacted, down to the Revolution, by laws made to force conscience! There is certainly nothing more unreasonable, nor inconsistent with the rights of human nature, more contrary to the spirit and precepts of the Christian religion, more iniquitous and unjust, more impolitic, than persecution against natural religion, revealed religion, and sound policy. The great, and wise, and learned judge observes: "The true principles of natural religion are part of the common law; the essential principles of revealed religion are part of the common law, so that a person vilifying, subverting, or ridiculing them may be prosecuted at common law; but temporal punishments ought not to be inflicted for mere opinions." Long before this, much suffering, and a mind of strong and liberal cast, had taught this sound doctrine and this Christian precept to William Penn. The charter of Charles the Second recites, that "Whereas our trusty and beloved William Penn, out of a commendable desire to enlarge our English empire, as also to reduce the savages, by gentle and just measures, to the love of civil society and the Christian religion, hath humbly besought our leave to translate a colony," &c. The first legislative act in the colony was the recognition of the Christian religion and establishment of liberty of conscience. Before this, in 1646, Lord Baltimore passed a law in Maryland in favor of religious freedom; and it is a memorable fact, that of the first legislators who established religious freedom one was a Roman Catholic and the other a Friend. It is called the great law, of the body of laws in the Province of Pennsylvania, passed at an assembly at Chester, the 7th of the 12th month, December. After the following preamble and declaration, viz.: "Whereas the glory of Almighty God and the good

of mankind is the reason and end of government, and therefore government in itself is a venerable ordinance of God, and forasmuch as it is principally desired and intended by the proprietary and Governor and the freemen of the Province of Pennsylvania, and territories thereunto belonging, to make and establish such laws as shall best preserve true Christian and civil liberty, in opposition to all unchristian, licentious, and unjust practices, whereby God may have his due, Cæsar his due, and the people their due, from tyranny and oppression on the one side, and insolency and licentiousness on the other, so that the best and firmest foundation may be laid for the present and future happiness both of the Governor and people of this Province and territories aforesaid, and their posterity ——" (Then follow enactments against profanity, blasphemy, and violation of the Lord's day.) . . . . .

Amidst the concurrent testimony of political and philosophical writers among the Pagans, in the most absolute state of democratic freedom, the sentiments of Plutarch on this subject are too remarkable to be omitted. After reciting that the first and greatest care of the legislators of Rome, Athens, Lacedæmon, and Greece in general, was, by instituting solemn supplications and forms of oaths, to inspire them with a sense of the favor or displeasure of Heaven, that learned historian declares, that we have met with towns unfortified, illiterate, and without the conveniences of habitations, but a people wholly without religion no traveller hath yet seen; and a city might as well be erected in the air, as a state be made to unite where no divine worship is attended. Religion he terms the cement of civil union and the essential support of legislation. No free government now exists in the world, unless where Christianity is acknowledged and is the religion of the country. So far from Christianity, as the counsel contends, being part of the machinery necessary to despotism, the reverse is the fact. Christianity is part of the common law of this State. It is not proclaimed by the commanding voice of any human superior, but expressed in the calm and mild accents of customary law. Its foundations are broad, and strong, and deep; they are laid in the authority, the interest, the affections of the people. Waiving all questions of hereafter, it is the purest system of morality, the firmest auxiliary, and only stable support, of all human laws. It is impossible to administer the laws without taking the religion which the defendant in error has scoffed at, that Scripture which he has reviled, as their basis. To lay aside these is at least to weaken the confidence in human veracity so essential to the purposes of society, and without which no question of property could be decided and no criminal brought to justice; an oath in the common form on a discredited book would be a most idle ceremony.

Providence Railroad Company *vs.* City of Boston*

THIS case was a bill in equity filed by the Boston and Providence Railroad Company against the City of Boston, praying the court to enjoin the city from making sale of a strip of land adjoining the land northerly on which the complainants' *dépôt* and passenger station, and other buildings, had been erected. The city officers advertised this strip of land, with other lots, for sale at public auction. The railroad company claimed to be entitled to the use of said strip of land, as a public street or highway, and contended that it had either been *laid out as a street* by the proper authorities of the town, in 1794, or was such by *dedication* at some period subsequent. The city of Boston denied both these propositions, and maintained that the land in question was not subject to the encumbrance claimed to have been impressed on it, and was free to be sold or disposed of at the pleasure of the city.

The court ruled that the premises had been appropriated to the purposes of a street, and could not be sold without a violation of the rights of the complainants. The following argument was delivered by Mr. Webster, as counsel for the city of Boston.

MAY IT PLEASE YOUR HONORS:

There are two or three points which, in the multitude of questions to be considered in this case, I shall leave where the counsel for the complainants has placed them, without further discussion. One of these is that which arises upon the alleged encroachment of the railroad upon the land in question,

* An Argument before the Supreme Court of Massachusetts, sitting at Boston as a Court of Equity, on the 3d of April, 1844.

Of the very numerous arguments of Mr. Webster, in the ordinary practice of the profession, on questions of local interest, not involving political and constitutional principles, few have been reported, nor if reported would it have been expedient to introduce them into a collection of this kind. It has been deemed proper to make an exception in the present case, for the sake of presenting a single specimen of Mr. Webster's mode of arguing causes of this kind.

whether that be a street or land belonging to the city, by which encroachment it is averred by the city that the northern line of the railroad property is pushed farther north. This is a matter of detail, depending upon an examination of evidence, and I leave it to the judgment of the court without discussion.

Another question is that respecting the averment that the land in controversy is a part of the Common. This is also to be ascertained by an examination of evidence, by the original deeds and plans describing the Common, and by the votes and proceedings of the town, which have been fully laid before you. But I take occasion to say, as that is a question which has caused some interest and excitement, that, in my opinion, this land is not, and never was, a part of the Common.

If this street, or land, or whatever it may be, has become and now is a public highway, it must have become so in one of three ways, and to these points I particularly call your honors' attention.

1st. It must either have become a highway by having been regularly laid out according to usage and law; or

2d. By *dedication* as such by those having the power to dedicate it, and acceptance and adoption so far as they are required; or

3d. As a highway by long user, without the existence of proof of any original laying out, or dedication.

It is not pretended by any one that the land in question is a highway, upon the last of these grounds. I shall therefore confine myself to the consideration of the other two questions; namely, Was there ever a formal and regular laying out of a street here? or was there ever a regular and sufficient dedication and acceptance?

The general history of this strip of land, so far as this controversy is concerned, is well known, and the facts are all fully narrated and exhibited in the evidence which has been laid before you. In the year 1794, there existed in the town of Boston six ropewalks, all in the central part of the town, on Atkinson and Pearl Streets; but they were all burnt down in July of that year, much other valuable property being destroyed by the same fire. It immediately became an object of public interest to take measures to transfer the site of these ropewalks, and to

come to an understanding with their proprietors that they should not rebuild upon the old locality. A town-meeting was accordingly called; and a committee was raised, with instructions to confer with the ropewalk proprietors and come to some agreement with them to place their buildings upon the marshes "at the bottom of the Common," as it was expressed. This was considered a very important matter. The committee appointed consisted of some of the most distinguished inhabitants of the town, among whom I may mention Judge Minot and the late Governor Sullivan, names eminent in our history.

The history of this piece of land, from the date of this meeting down to the present day, divides itself into three eras or periods: the first, from the votes and grants of the town in 1794 till 1824, when all property in these lands was reconveyed to the city, a period of thirty years; then from that time until the location of the track of the Providence Railroad in 1833–4, a period of ten years; and then to the laying out of the land into lots, about a year ago. These three periods cover about fifty years.

The general question is, whether this land became a public road or way, either by a formal laying out or by actual dedication, in either of these periods.

The plaintiffs' bill alleges that there was a public way laid out, either by the votes of the town in 1794, or by other acts subsequently accepted by the town. These acts we suppose to mean the grants made by the selectmen in compliance with the authority conferred by these votes. The first subject of inquiry, therefore, is into the true character and effect of the grant of 1794, and the conveyances made in pursuance of it; and into the acts of the parties under that grant and conveyance. Do either or all of these show that a road or way was laid out upon this land in 1794 or 1795?

Now I will first pause for a moment to recall your honors' attention to these proceedings in 1794. At the town-meeting, after the general object for which it had been called had been stated, the record says that they proceeded "to the second article of the warrant," which was, "Whether the town will appropriate the marsh at the bottom of the Common, or any other of the town's lands, for ropewalks for the accommodation of the sufferers by the late fire"; and subsequently they appointed a

committee to confer with the ropewalk proprietors, and "cause a survey to be made of the marsh at the bottom of the Common; also, part of the land on Boston Neck, that may be sufficient for erecting the like number of ropewalks as were owned and consumed."

At a subsequent meeting, on the 1st of September of the same year (1794), the committee made their report, in the form of votes, which they recommended the town to adopt. They were clearly and distinctly drawn up, doubtless by one of the eminent professional gentlemen who were on the committee.

These votes first grant to the owners of the late ropewalks "a piece of marsh land and flats at the bottom of the Common," and then proceed to direct the manner in which it is to be held, and the restrictions upon its use. Thus it was provided that the land should be divided into six parts or lots, one for each sufferer by the fire; the whole land was sufficiently and particularly described; and there are then several provisions with regard to the manner of the use. First, it is provided that, in consideration of this grant, neither of the grantees shall erect ropewalks on the land in Pearl Street occupied by their late ropewalks; secondly, that there shall never be any buildings but ropewalks, nor more than six of them, erected upon the granted land; then that the heads of the ropewalks shall be placed upon the southerly ends of the respective lots; then that the grantees shall erect, within two years, a sufficient sea-wall along the whole westerly side of these lands.

The votes further provide, that "nothing in the foregoing grants shall be considered as conveying to the said grantees, or either of them, *any right of passage* in any direction *across the Common*, to or from the said granted lands."

The selectmen are then instructed to execute deeds to the grantees embodying these conditions, and they are also directed by the last vote to "lay out a road sixty feet wide, from Pleasant Street along the easterly side of the lands hereby granted, over the marsh, towards Beacon Street, in order to meet a road that may be opened from West Boston Bridge."

These votes were all passed, and the grants were all made, subject to a reservation expressed in the following terms: —

"Reserving, however, sixty feet in width across the southerly

end of said piece of land, for a road from Pleasant Street to the channel."

The word used in making this reservation is simply "road"; not "way" or "public way." Now I understand these two words, "road" and "way," to be synonymous. There may be a "public *way*" or a "public *road*," a "private *way*" or a "private *road*"; and when either word is used without a qualifying epithet, evidence of the whole transaction must be looked into to show whether a public or private way was intended. It may be either; and in every case where either of these words is used without any qualifying word, it must be judged by the context, and by other known circumstances, what is its meaning in that particular case.

What, then, was the meaning of these votes? What did they accomplish? What was it intended that they should accomplish?

Now, whatever was the meaning and intent of this reservation, it is clear that by this vote the town could not lay out a highway. It could not do this at all without the action of the *selectmen*. To lay out a street is one of the functions delegated by the statutes to the town officers, who are the selectmen; a function which must be performed by the legally delegated body. It is sometimes the course for the town to request the selectmen to lay out the road. The practice shows that it is not in the power of the town to lay out a road, but in that of the selectmen. The town accepts the road after it is laid out. The selectmen may lay out a road without its being accepted; or the town may request the selectmen to lay out a road, and be refused. Neither possesses the power of the other.

Then the question is, In what capacity was the town acting in passing these votes? Was it engaged in a *municipal* capacity, performing its public trust, or was it managing its private affairs, acting just as any other corporation or individual owning property would do when about to transfer that property? There was no municipal act at all, except that it was the act of a municipal corporation. The town was doing only what every proprietor about to dispose of his soil usually does.

Allow me to say here, that some confusion arises from calling this land belonging to the city "*public* lands." It is *private* land, *private* property; just as much as that of the Providence

Railroad Company; not devoted, to be sure, to private use, but private property which the city happens to own, and which it may dispose of at any time as such.

The town, then, was acting as a mere proprietor; selling a part of its land, and granting an easement over the rest, so that the purchaser might use the part he had obtained. This is the obvious character of the transaction. The land lay in the bosom of the marsh; and unless there was access to it given over the other lands of the grantor, the lands granted would have been of little or no value. If they had been granted without provision for any right of way, what would have been the rights of the parties? The grantee would have been entitled to a "way of necessity," as it is called; the right to pass over *other* lands of the grantor in order to get upon his own lands. And where he has this private way of necessity, then, unless it be made matter of agreement, the grantee is to select his own way wherever he chooses. Each of several grantees, also, is entitled to take the way most convenient to himself, unless a certain way has been provided for him by agreement.

Now in this case there was done exactly what was most convenient and proper. It was agreed that the grantees should have a certain access to their lands over lands of the grantor, and one that was most convenient to them; and this arrangement secured the efficacy of the provision that the grantees should have no right of passage in any direction *across the Common*, to or from their lands. This seems distinct, proper, and in accordance with the rights of the parties.

Now I do not deny that the town, or other grantor, in making the grant, *may* provide access over its remaining lands to the granted lands, by means of a public highway, or land granted for use as a highway. The town did so at this very time with regard to Charles Street, and I now proceed to explain the meaning of the reservation in question by that act, in regard to Charles Street. Every thing in the warrant calling the town-meeting whose acts we are considering (with one exception, unimportant in itself) related to this matter of the ropewalks. Nobody had petitioned for any *way* or *road*, and it is evident that when they made the private way, and when they made the public way, Charles Street, they were doing two separate acts necessary to carry out the project of transferring the site of the ropewalks.

Now, although, in the two cases, the same language is used in one respect, namely, the word *road*, it is to be remarked that they *lay out* this Charles Street. They do it by the same phraseology, by the same term "road," but by what else? They say there should be a road sixty feet wide from Pleasant Street along the eastern edge of the lands, to be joined by a road expected to be made from West Boston Bridge. And they direct the selectmen to lay it out. I presume the selectmen did lay it out, and that, when it was laid out, it was accepted by the town, for it is now upon the list of the streets.

But the proceedings of the town in the two cases were very different, each being suited to the objects to be obtained. The one was to be a public street, an open and general thoroughfare, a line of passage from the north to the south end of the town. This they directed the selectmen *to lay out;* they did not merely *reserve* the land. They directed the selectmen to lay out the road, and they did it. But the proceedings about this strip southeast of the ropewalk lands were wholly different. It was a road which, as was said by one of the witnesses, "ran overboard." The reservation on paper went down to the channel; for it was intended to build the ropewalks over tide-water; and they were actually built with their heads standing on solid land and the rest upon piles, and, until the Mill dam was constructed, the water flowed in under the ropewalks at every tide.

I submit, therefore, that *nothing but an easement* was intended, coupled, perhaps, from the language used, from the breadth reserved, and from its being extended down to the channel, with the idea, and the contemplation, that a road might at some future time be laid out for the use of the town. I have already observed, that the town could not lay out a street by its own authority, but that it was not unusual for the town to request the selectmen to lay out the street, and for the selectmen to comply, not to *obey*, for the action of the town has not the effect of a command. Now I submit, that if, by this reservation in the vote of the town, it was intended to lay out the street, *it was not legal.* If it was intended as a direction to the selectmen to lay out the street, why was not the proper language used? If it was intended to lay out a street by the mere action of the town, why did they not say so? If it was intended

to direct the selectmen to lay it out, why did they not say so? For at the very same meeting, in directing the selectmen to lay out Charles Street, the town knew what language to use, and used it. If, at the same time, treating upon two similar subjects, in written and deliberate votes, it used dissimilar language and a dissimilar form of proceeding, who shall say that it had not a dissimilar meaning? Who shall thus confound things, and confuse the meaning, and the results of one of the most discreet and deliberate proceedings of a public body?

I have said that nobody at that meeting spoke of making a public street; that this way led down into the sea; that no one had petitioned for a street in this direction; but the whole of this proceeding was the result of an agreement, and a bargain. The ropewalk proprietors joined in a conference with the committee of the town, and the result was a bargain, an agreement, a compact, a series of covenants in relation to these lands. The town, on its part, entered into covenant; the ropewalk proprietors entered into covenant; so that the bargain was prepared by previous consultation and conference, and the terms were reduced to precise and stated form. In this form the contract was agreed to by the town, and in this form it was agreed to by the proprietors of the ropewalks.

I cannot imagine any argument to be drawn from the votes or records of this meeting, to maintain that this was a grant or dedication for a public road. It is to be considered as the result of the agreement on which it was founded, and which it was intended to carry into effect. It is worthy of remark, that access to the ropewalk lands was not provided by passage and right of passage generally granted merely, but by a specified, distinct way. It is obvious, also, that the reservation reaches beyond the ropewalks, and extends down to the sea. It may have been one object of this to give approach and access to the ropewalk lands from the water, because there was a wharf near.

But further, if this was a laying out of a street, by the selectmen, or any body else, where is the record of it? Although such an act may be done, it could hardly be done *sub silentio*, and without a record.

We have no reason, then, to suppose that the votes of the town laid out this road for a public street; and this brings

me to the deeds of conveyance made in pursuance of those votes.

I suppose that these deeds, assuming the rest to be like that to McNeil, are relied upon to prove that the selectmen did lay out this road, or that they contain a recital that estops the city from denying that the road was so laid out. Now is this recital any proof of the fact that the selectmen did lay out the road? Let me call the attention of your honors to what they had been directed to do in 1794, not in their official capacity as selectmen, but only as agents of a corporation. The vote might as well have directed the town-clerk, or town-crier, or any other official, to make these deeds, and the conveyance would have been as valid and effectual. It is further important to observe, that this authority, these votes, under which the selectmen acted when making these conveyances, were all precise, definite, and full; that their limitations and provisions were as particularly drawn as those of a power of attorney.

Now let me remark, that early in 1794, before the date of this conveyance, difficulties had arisen about the location of these ropewalks, after the grant of the land, and before the execution of these deeds. Your honors will please to refer to the proceedings of the town-meeting in 1795. These proceedings will be found to contain a charge against the ropewalk proprietors, that they had encroached upon Pleasant Street, by extending the heads of their ropewalks too far south. These deeds were not executed until 1796. Before the execution of this deed to McNeil, a sea-wall had been built. This we know, because the wall and the building of it are referred to in the proceedings of the town-meeting in 1795. After the wall was built, the water came up to it, and even overflowed it at high tides. The facts that the wall was already built, and that the ropewalks were built, were both recognized by the proceedings of the meeting in 1795. The selectmen (it appears that they were an entirely new set) were about to execute the deeds; and in this state of the affair the draughtsman committed *a sheer blunder*, by bounding the land on the south "by a street lately laid out by our selectmen, leading from Pleasant Street to the salt water." This is a description, and not a recital; and but an imperfect description, for the salt water was found at the wharf, and the street, if it were a street, extended to the channel.

This was all a mistake. There was no street laid out by the selectmen. For, first, there is no record of it on the books of the city, nor any reason, from any evidence in the case, to suppose that any such thing took place. If it had taken place, it would have been the duty of the selectmen to report it to the town; but there is no report, nor any action of the town on such report, in the records of either. Then, many persons are still living, fully conversant with the events of that day, and in full memory of all the proceedings in this matter. One of the ropewalk proprietors is still living, Mr. Howe, who, though not an original proprietor, soon became one by the death of his father, working there daily from the time he came to man's estate. Many other persons, connected with the town government, and living in the neighborhood, are familiar with the land there, and its changes; and yet not one of them knew any thing about this laying out, or pretends to say that the selectmen laid out this street. If the selectmen did lay it out, as they did Charles Street, or as they did a dozen others, why did they not also record it, and report it? In point of fact, I suppose there was no street laid out.

The deed itself purports to be made after the votes of the town in 1794. It founds itself upon them, and refers to them, as to another deed, for more particular descriptions. It refers to no particular powers of the selectmen, and is in this respect quite remarkable. I will read the deed: —

"Whereas, at a legal town-meeting of us, begun on the 28th of August, 1794, and continued by adjournment to the 1st of September next following, it was voted that there be granted to the owners of the ropewalks in this town lately consumed by fire, a piece of marsh land and flats at the bottom of the Common in said town, upon certain terms and conditions in the said votes expressed; now know ye, that we the said inhabitants, for and in consideration of the conditions, restrictions, and limitations hereinafter mentioned, but more particularly mentioned in our votes before referred to, do hereby give, grant," &c.

Such is the recital of the terms of the grant, and here comes the description: —

"A certain piece or parcel of land situate at the southerly part of said town, at the bottom of the Common, there so called, fifty feet in width and extending from a line drawn parallel to Beacon Street five hundred

feet from the same street to a street lately laid out by our selectmen, sixty feet wide, leading from Pleasant Street to the salt water, bounding northerly on the said line, easterly on land granted to Samuel Emmons, southerly on said new street, and westerly on land granted to John Codman."

The mention of this street is not by way of recital, it will be seen, but in the description of boundary. By a mistake in such a description no one is barred. It is simply a description. My learned friends say that it is a declaration, an averment by the town of Boston, that there is a public street along the southern line of the ground described. To cover their ground, they must not only say that there is a street, but take the whole statement as an estoppel. They make this to be a statement that this land is an open public street, laid out by the selectmen; and this they say is an estoppel that keeps us from holding that this street was never so laid out.

How can this be? The selectmen were mere agents, I might say they were mere instruments to perform what must be performed by some agents. But the limitations and all the acts of the parties were fully defined and fairly set down and expressed. They did not act in this matter in their official capacity, but as mere agents, and if they have transcended the limits set for them, the town is not bound by it. Their authority was a public, clear, written, indisputable record, known to every body, simply to execute grants founded on a transaction publicly understood, and it expressed the terms of a bargain to which these grantees were themselves parties. No one will say that the selectmen could extend the meaning of this agreement, and enter upon a covenant for which it did not provide; and further, since in the other covenants of the deed they follow the provisions of the votes from which their authority was derived, it is to be presumed that they intended to do so here. *Expressio unius exclusio est alterius.*

Agents not only cannot bind themselves by an act transcending their authority, but such an act is not evidence against their principal in any case arising out of it. No saying or declaration of such an agent is more evidence against his principals than that of any other man. This declaration of the deed is not evidence against the town, because the selectmen had no power to enter into a covenant which was to make that land a

street, but were simply to convey certain lands as they were described in their power of attorney. Nor does it amount to any thing that the ropewalk proprietors used the same words of description in after conveyances, because we all know that one deed is copied from another, that the object often is to make them cheap and short, and that in this country, in ninety-nine cases out of a hundred, a man conveying the same thing that he has previously purchased, copies from the deed he received, or refers to it for the description in the new deed. If the selectmen had been acting for themselves, as individuals conveying their own property, there is nothing in this deed which would estop them from denying the existence of a road laid out upon the south line of the premises. The words in which such a road is spoken of are words of description only, and not of recital, and this makes the distinction of the cases where parties are held to be estopped by their own deeds and where they are not. I shall not cite cases to this point, but will refer your honors to the first volume of Greenleaf's Evidence, pp. 30 to 32, where the cases which are collected show the distinction between terms of description and terms of averment.

But suppose we are to take it for granted that the selectmen did lay out a street here, what kind of a way was it? Was it a public way? If your honors are to presume they laid out *any thing*, it is to be supposed to have been in conformity with the authority under which they acted; and if that authority was for a private way merely, the presumption is that they conformed to it, and laid out merely a private way.

There is another point or two with regard to this.

Recitals in deeds, when they estop any body, estop only in favor of those claiming under the grantee; they confer no rights upon strangers. The Providence Railroad Company does not claim under the ropewalk proprietors. It has no privity with them, and it cannot therefore avail itself of any estoppel in the deeds to those proprietors, if such there be.

I know very well that a court of law, looking back at a transaction now no recent one, will be glad to find any plausible explanation of any act, fact, or transaction, which does not appear to agree with the rest of the history. It is glad to make the whole train of events consistent; and I think it is not hard to suggest at least a probable reason of this discrepancy in this

deed. Let us suppose that something had been done on this piece of land by these public authorities, between the dates of the votes in town-meeting and of the execution of the deeds. To persons not consulted about the matter, it might appear that this *something* was the laying out of a road, and they might have been led into this mistake even by the conduct of the selectmen whom they saw on the land "reserved for a road," doing something apparently in an official capacity. Now it is in evidence that these selectmen did do something on this land within this time. It is in evidence that they went upon these lands, measured the encroachments which had been made, and gave a marked limit to the ropewalk proprietors; that in the interval between the votes in town-meeting and the date of this deed, the public authorities went down upon this land and marked out a boundary upon it. Your honors will see that this proceeding limited itself to a very small line of boundary; but it is extremely probable that they went further, and marked out the whole of the southern boundary of the ropewalks. We know from the records of the town-meeting that they did establish the point as far as the ropewalk proprietors were concerned, and compelled them to retire from the town's land upon which they had encroached, and marked a stated limit by staking it out at the time. This was done by authority from the town, and might have been done, doubtless, by the selectmen without such authority. But it was just such a proceeding as would require no record, report, or after proceeding, and this accounts, and this is the only thing that can account, for there being no report or record of it. There is nothing more probable than that the new selectmen or the draughtsman, yes, the draughtsman of this deed, may have mistaken in his description the nature of this act of the former selectmen, and that thus this apparent incongruity may have got into the case.

The ropewalk proprietors reconveyed these lands to the city in 1824, and this terminated the first period in the history of the strip in dispute. This reconveyance was entire and absolute; and of course under it, by force of law, this particular strip of land, unless it had in the mean time become a *public highway*, returned to the city, and the easement became extinguished by the unity of possession.

We have now seen the origin of the title of the ropewalk

proprietors so far as it was written. It rested in the votes of the town and the deeds, with their somewhat restricted declarations and covenants. Now if from these we can obtain a clear and distinct meaning, it is the true and correct one; but if it is in any degree doubtful, we can enter upon the evidence of what was done under these deeds and votes, to elucidate and explain their meaning. All law-writers recognize, common sense recognizes, this principle of interpretation, but the doctrine is expressed so accurately, tersely, and completely by Sir Edward Sugden, that I will quote his words.

"One of the most settled rules of law for the construction of ambiguities in ancient instruments is, that you may resort to contemporaneous usage to ascertain the meaning of the deed; tell me what you have done under such a deed, and I will tell you what that deed means." *

I propose now to call the attention of your honors to what was done under these covenants. What was the conduct of the respective parties to them during this first epoch of thirty years?

We are met, succored, relieved here from all doubt or apprehension which the greatest ingenuity could suggest, by the fact, that, during all this period, neither the city nor the town, neither the ropewalk proprietors, the selectmen, nor any subordinate officer, not one of them, has ever performed one act which, under any fair construction, could be considered as recognizing the existence of any *public* way over this land. The town never built the road; there was at that time no beaten path there; it was never entered on the list or in the books of the town; it was never reported as needing repairs; it was never repaired, built, touched, by the town of Boston, during this whole space of thirty years, or by any agent or functionary of the town.

Here is the conduct of the grantor; let us look at that of the other party. Long engaged in a controversy in regard to their encroachments, with which the town of Boston was energetically plying them, did they ever set up the claim that it was the duty of the town to build this road? Not in the least! But they went on, at great loss and labor and sacrifice, to make the road themselves. They constructed the long sea-wall along the western margin of their land, a work of such magnitude,

* Attorney-General *v.* Drummond, 1 Drury & Warren (Irish Chancery Reports), 353.

that it was ten years before immense labor and unwearying industry completed it, and made a practicable road down to the edge of the sea. In the face of these difficulties, if there had been any thing in the *deeds* to compel the town to adopt the street, how can we account for this acquiescent conduct, so directly adverse to their interests? Does any one suppose that, if the deeds gave them any ground to consider this a *public road*, Mr. Howe and the rest of those concerned would have remained there day after day, and year after year, toiling in the mud to make the road themselves? Then we have living witnesses, the town and city officers for many years, none of whom looked upon this as a street.

But I will state it in the briefest manner. Every body at all conversant with the matter for those thirty years, from the beginning, knows that the town was doing that, through the whole of that time, which it could not have done had the land been a public way; it omitted all care and attention. On the other hand, the grantees did what no duty required them to do, but what every interest and the proper enjoyment of their property made it necessary for them to do for themselves. And if we go over the evidence ever so carefully, or ever so slightly, we find this to be the result, and we see that every body thought that the town took the land back to itself, just as it parted with it.

I will cite 5 Pickering, 485, the case of Jones *v.* Percival, to the point that a private way is to be repaired by the grantee of the way: and *e converso*, I suppose, a public way is to be repaired by the public.

It is to be remembered that at this time these were all waste lands. About 1801 or 1804, a carpenter's shop was built, facing Pleasant Street. Mr. Vose's house was built in 1807. The carpenter's shop was moved back, and another house built, before the year 1824. It is not to be doubted that Mr. Vose went, that the inhabitants of all these houses went to and from them by this way; Mr. Vose, indeed, having his own sidewalk on his own land.

When a man has a right to a practicable way over his neighbor's land, he is not called upon to make the road for his own use. If the way is not practicable, the grant of it carries with it the *right* of building a road, and keeping it in repair. Let us suppose that here the road was necessarily a built or constructed

road; how does this affect the city of Boston? The owner is undoubtedly obliged to keep a private way in repair for his own purposes, and it is well settled that the owner of a private way, finding people breaking up his way, may maintain "case" against them, although not "trespass." While this road continued its character of a private way, even if a thousand years should elapse, and a hundred people should pass over it every day, no rights against the public could be obtained. In a case where, under a lease of ninety-nine years, a private way, made so by the lease, was allowed by the lessee to be used by the public after the expiration of the lease, the lessor set up that the land reverted to him; and this was held to be right, because, before the expiration of the lease, the public use was of no injury to *his* property.* Nobody here asserted a right to the use of this road; only the persons interested, Mr. Vose and his tenants, used it.

Then there are the dealings between Mr. Vose and the selectmen in 1824. The latter proposed that his doorsteps should be abated, because they encroached upon the public lands. It would have been equally an encroachment, whether they were obtruded upon a *street*, or upon *lands* which were the property of the city; but Mr. Williams said that they, the selectmen, spoke of the encroachment upon the *lands* of the city. Because their predecessors had been complained of for neglecting the public land, he was induced to keep a sharp eye upon the interests of the town in this respect. He went to look at the alleged encroachments upon the *public lands*. He took some of the other selectmen with him, and they conversed upon the matter with Mr. Vose. The whole conversation turned upon this fact, that the steps were an encroachment on the *lands* of the city. Mr. Vose replied, that these were all waste lands, that nobody used them, and asked why, in these circumstances, they should put him to an expense of one hundred dollars to withdraw his steps. Mr. Williams says, that upon these grounds they allowed him some indulgence, and that the matter was to be settled at a future time. He has no recollection that he called again; but if he recollects rightly, all that was said by the parties to that conversation was of an encroachment upon the *public lands*.

* 5 Barnwell & Alderson, 450.

This brings me toward the last period of the history of this matter.

About 1820, the mill-dam was built, and this shut out the water from the flats below these lands. The sea-wall was not removed till 1830, as appears from the depositions of Fuller and Dexter. Below the wall, Mr. Vose permitted others to erect some shops; but there was no access down this way till after 1830, because the wall was still there. I refer your honors to Mr. Kidder's deposition, cross-examination, first answer; Fuller's cross-examination, question fourth; and direct examination, questions seventeenth and eighteenth.

On the other side, what acts are there which show the sense of the city with regard to these lands, from 1820 forward? In the first place, we have the report of Mr. Apthorp at the time the reconveyance of these lands was made. In this report, all these lands are treated as public lands, which might be offered for sale by the city. This was in 1824. Secondly, there is another fact; namely, the building of the new street from Pleasant Street to Charles Street, a street parallel to this supposed street. This was built in 1824, as a continuation of Boylston Street. It was built and used for access into Church Street. There could have been no object in building it, and it would not have been built, if there had been already a way in existence convenient and open a little farther south. If the town had supposed that there was any such way in existence, it would have availed itself of that, and not have gone to this further trouble and expense.* Thirdly, I refer your honors, with emphasis and brevity, to the transactions of 1828; to the votes of the city in 1828, as they appear in the exhibit of Eliphalet Williams.† On the 28th of January, 1828, an order passed by the mayor and aldermen, upon which, on the following March 3d, a committee reported that there were certain lands, which it was expedient for the city to sell, marked numerically upon a plan, and this piece of land at the southerly part of the town, embracing that now in dispute, was described under this head.‡

Now, Mr. Williams § asserts positively that this land, the lot marked 5, embraced all the land covered by the alleged street; and the report says: —

* Kidder, cross-examination, first answer.
† Kidder, 5.
‡ See report and plan, land marked "E."
§ Answers 9th and 10th.

"5th. A piece of land situated west of Boylston Street and of the northerly part of Pleasant Street, and southerly of a line drawn parallel to the Mill-dam, 1350 feet distant therefrom. This piece of land contains 126,000 square feet, and is capable of being laid out into streets and lots advantageously; and although after it is thus laid out it may not be expedient to offer the whole for sale immediately, yet it is expedient, in the opinion of the committee, to lay the same out and commence sales of it under the direction of a committee. It may be proper here to observe, that the space proposed thus to be put in a state for sale does not interfere with the Common, but is that portion of the public lands which have always been deemed proper and within the power of the city council to sell, as not being within the north and south lines of the Common extended. Read and accepted, and ordered that the Mayor, Aldermen Loring, Upham, and Armstrong, with such as the Common Council may join, be a committee to carry the same into effect. Sent down for concurrence; came up concurred, and E. Williams and others joined on the part of the Common Council."

Mr. Francis Jackson has verified the plan of the land, and has testified that that plan embraces the land under dispute, and that the report accompanying it was accepted; and Kidder testifies, that, in view of the sale, coarse fences were built, and that they covered the whole way, as it is called, up to Vose's house. This was the report and plan which we have here. It was accepted by the city government; the rough fences were built to mark out the land into lots, and these actually covered the supposed way, and this without complaint. Where was Mr. Vose then? Where were his tenants, that he and they made no complaint that this road was thus shut up, and they shut out from their own front door? These fences remained there without objection, till they were gradually carried away for firewood. Did this look like any admission on the part of the city, that this was an open and public street? For where ownership has been asserted by the erection of a slight fence, and then the fence has been taken away by the party claiming adversely, it has been held that this rebuts the presumption arising from the user of that party. I ask your honors' particular attention to this point.

Let us then proceed to the transactions of May, 1832, for there were two transactions in 1832. Now what was the first of these? It was the application by Purkitt and Vose to ascertain the line of their property. Vose's property was bounded

upon this land, and he chose to call it a "street" in that application. The city assented to the proposal to run the line, but in no way bound itself by this use of the word "street." Mr. Fuller reported the result of his survey to the city, and stated, that "it does not appear that a street was ever laid out," but says, this, and this, and this, is the line between Vose and the city. This report was accepted and placed on the records; and on whose request? On that of these two persons; entirely, I suppose, on that of Mr. Vose and Mr. Purkitt. Being so recorded, this is completely binding. They got up the application. They desired to have an established line for the boundary of their land; and the authentic document describing that line says that it separates them, *not from a street*, but from certain lands belonging to the city of Boston. Did they protest against this description? In no degree.*

As an equal proof of the view then taken of these lands, I may refer your honors to another proceeding in August, 1832. An application was made by the Worcester Railroad for leave to take certain lands for the erection of a *dépôt*. Let us look at the nature of that application. Was it a request to the city to repair or put in order a *street?* to build, work, or repair a highway? By no means. The Worcester Railroad came as a purchaser, and wished to purchase that which it was not doubted was land of the city. The government feeling doubtful whether this was not *a part of the Common*, a question raised at the time, referred this question to the people, to be decided by a vote in Faneuil Hall. The people negatived the vote, and refused to sell the land at all. Remark that this was a proposition to purchase, and a refusal to sell. It was a design of the city government to make manifest in the plainest way what it was that the Worcester Railroad wished to buy. I am sure that no man can doubt the railroad wished to buy *this* land. Here is a plan, proved by Mr. Jackson to have been made on this occasion, and put up along the streets, that the citizens might see upon what they were called to decide. It is worth while to know that on this plan, the strip in red being what the railroad wished to buy, the strip between that and Elisha Vose is marked "Lands of the City of Boston, containing —— feet." This matter was made a subject of full discussion at the time;

* Defendant's exhibit, No. 35.

but none of those who talked of it, none of the orators at Faneuil Hall, nobody noticed, or appeared to think, that this was a *street*. Could they have done so, they would have urged it strenuously. It was a most natural idea to strengthen the notion that this was a part of the Common, by saying that a part of it had already devolved to the public as a public highway. If this had occurred to any body, we may be sure it would have been stated.

It must be perfectly plain, then, that up to August, 1832, one short year before the Providence Railroad was laid out, the whole town of Boston and every one of its inhabitants supposed that this was land of the city, and not a street open to every body. About this time the directors of the Providence Railroad made their report upon the location of their *dépôt*, and, nothing further occurring, this state of things existed up to 1833. And thus, by all these acts, by its surveys, fencing, records, and offers to sell, through all this period, the city was asserting its right to this land, and nobody was objecting to it; and in this we have the best evidence that this was the view that every body took of this property till 1833, when these gentlemen located and fixed their *dépôt*.

And now we come to the last ground of the complainants, and that which, if I may judge from the earnestness and ability with which it was urged, is considered the strongest ground of their case. Let us look at the occurrences from 1833 to the time of the filing of this bill. What acts were done during that time, or were suffered to be done, by either party to this matter, on which the plaintiffs can rest their great hypothesis of the dedication of this land by the city to a public use?

But before proceeding to these facts, allow me one word upon the law of dedication.

Certainly it is not for me to controvert any thing that this court has decided and established. I am perfectly willing to admit that a dedication of land by the owner of the soil, clearly and fully proved, and assented to by the county and town authorities, is competent to make a public street. I do not mean at all, indeed, to controvert the opinion of this court upon this subject, in the case of Hobbs *v.* Lowell.* But it would seem

* 19 Pickering's Reports, 405.

to be necessary that there should be a clear dedication, and an adoption by all the authorities, county and municipal. But if any assent or adoption, and if any, whose, is necessary, in case of an opening of a public highway by a town over its own land, is not decided. This is an open question, and it is my purpose to say something upon it.

First, as to the act of dedication. The first element of law in regard to this is well laid down in the Lowell case. It must be the act of the owner of the soil himself, done with the intent to dedicate the soil.

I do not understand the counsel of the complainants to rely upon the votes of the town in 1794, or upon any thing that occurred before 1832, as making out a dedication of this land to the public. This is a wholly different ground from the others, and no writings are relied upon to support it; and I have suggested all that I have to say with regard to those previous transactions. Their argument, as I understand it, is this. For more than nine years this land has been used as a common way, every day, by many persons, wholly undisturbed, in full view of the city government, and of all other persons, and has thus become a public highway, if it is not a way otherwise laid out.

What idea can a lawyer form of a dedication of land? Can he form any that is not in some sort a grant? Has he any notion of a proceeding of this sort, not amounting to the passing of the land from the grantor to somebody else? If there be any thing else which will fulfil the idea of a dedication, I should like to be instructed. It is not a present grant of the *fee*, but of the usufruct; it is not a grant of the *real property*. This is either given to the present grantee, or in expectation of the coming of a grantee in whom the fee may vest. It is a sort of grant by parole, conveying a property like that held by a *livery of seisin*, a "grant without fee," as the Supreme Court have expressed it; and where a man has made an open dedication by parole, he is estopped afterwards from saying that he granted only the use. He is estopped not by deed or writing, but *in pais*.

The dedication is of the use, the naked fee remaining to the dedicator. The Supreme Court of the United States has decided in all cases, or in three most important cases, that the use passes at present, but that the fee remains in abeyance till a

regular grantee appears. I will presently take an occasion to review these cases.

The dedication is to be by the owner of the soil. Certainly the city government was not the owner of the soil in this case. The city owns the soil. They will say, on the other side, that the government are the agents of the city, and that the city must act by agents, and that the land could be dedicated only by government. I admit that the city councils are agents. But how? Are they unlimited and unrestricted agents? What act can they do beyond the charter? They are agents created by statute law. Although, when they act in an official character, they are not under the control of the town, and ought not to be, yet in a general sense, so far as they are agents, their powers are all set down by statute law. And the moment they step out of that power, they are no more the agents of the city than I am.

Every body says there must be an *intent* to dedicate, in order to make a dedication, but in these cases who is to entertain the intent? The selectmen may *lay out* a road, because the statute gives them authority so to do, but I deny that the selectmen can *dedicate* lands of the town to public uses, because no law gives them that power. There is no recognized mode of exercising that power, as there is in the other case. It would be sufficient to say that no such proceeding as a dedication has ever been made by the town officers of this State. And it is, I will not say bordering on the ridiculous, but inconsistent and incredible, to suppose that, where the act depends upon consent and intent, and where there is so simple a method for them to carry out that intent in a legal way, they should leave that to risk it upon this new and cumbrous proceeding that they never heard of in their lives.

They have no such power. Where would there be any limit to it, if they had? Why should the law prescribe the manner in which the selectmen of towns may lay out highways, if it was intended that they might thus create roads without its restrictions? I deny that they can lay out a road in any way but that prescribed by the statute. I deny that there is any authority, under any court in the country, to that effect.

Where an individual, may it please your honors, wishes that a highway should be established on his own land, there is a

just and rational meaning in his doing it by dedication, and laying it open to the public. He cannot make a road on his own land in any other way; if it is accepted by the proper authorities, county and municipal, it will become a public road. But what object can there be for the selectmen of a town to undertake to lay out a road in this manner, when there is a simple and effective way authorized by law, and daily exercised?

Your honors will perceive, that the very hypothesis of the complainants requires that they should show an intention to give up the land on the part of the city government. If they had such an intention, they had a regular way to accomplish it; why did they not adopt it? I submit that their neglect to lay out a road in this regular way is evidence to every reasonable man that they had no such intention. That could only arise from the public convenience and necessity. And if such necessity existed, their duty required them to accommodate it in the common and legal manner; and we are not to presume that they adopted any other.

I have already alluded to the absence of any such intent. How is it attempted to be proved? Each individual of the government denies that he had any such intent, but it is imposed upon them in the aggregate. It reminds me of the statement of Mr. Justice Blackstone, in his Commentaries, where he says that he cannot deny that witchcraft has existed, but that no one can say that it has been proved in any particular case. The intention imputed to the city government they individually deny; how then could there have been an aggregate intent to part with these lands?

Nothing is alleged with regard to the city government but forbearance for nine years; forbearance to prosecute, forbearance to shut up waste lands which were not wanted for present use. The inhabitants were indisposed to sell them for the present; they *were* waste lands, of no use to any body but the Providence Railroad; and was not this a just case for forbearance and indulgence? I refer your honors to a decision of this court.* A neighbor of mine had been in the habit of pasturing his cattle upon waste lands in the town of Marshfield, and, the

* 13 Pickering, 240.

town having inclosed this land, he brought an action, claiming the right of such use of the land from long user. It was decided that the property was still in the town; that his use had not been inconsistent with the owner's use, with any use of the property which the town originally had in the land, and that consequently no adverse possession had been obtained; that his occupancy must be presumed to have been a mere license. This is just this case. The acts and the use of the Providence Railroad did not interfere with any use the proprietors wished to put it to. In the case cited, the lands were public lands, used by the inhabitants of Marshfield for depasturing their cattle. Just so here: so long as the city had no use for these lands not inconsistent with the use made of them by the Providence Railroad, the occupancy by that company must be considered the result of mere license. Was it not an act of friendliness and forbearance, and not to be now set up as a giving away the land? It ought to be kept in mind, that throughout the whole of this time the city officers manifested a desire to sell the land, and did no act of dedication on the premises themselves.

In all the cases decided in England upon this subject, there was some original act of dedication. I know of no exception to this, save in a case which did not require any such act, because the road had been in public use for twenty-five years. There are, however, two cases in which there is so much discrepancy in the decisions upon this point, that they cannot be reduced to the same principle. One of these is that of the King *v.* St. Benedict, 4 B. & A. 447, tried before Lord Chief Justice Abbott, and Justices Holroyd, Bayley, and Best; the other, in which the opinions are just the reverse, before Justices Park and Littledale. The two cases are very different with regard to the law as to the assent of corporations to assume the charge of a highway; and I can only ask your honors to compare the reasoning in the reported cases, that of Mr. Justice Bayley in the one and Mr. Justice Littledale in the other, and to see which commends itself the most to your good judgment.

I wish to present this case under another and different aspect. Let us suppose that this land had been dedicated to the city for a street by an individual, and in the most unequivocal and notorious manner; take it to have been as good a dedication as

could be made; has any thing been done in this case that proves that such a street has been *accepted by the proper authority?* This point, as to who must accept the dedication, is left undecided in the case of Hobbs *v.* Lowell, and is one which must now be decided, and on which I shall therefore make some remarks. I leave it as settled that the *public* must give its assent, and assume the expense of the way; but what is the public? I have said that I look upon a dedication as being a grant, to which there must be two parties, a grantor and a grantee. And what is this public, whose concurrence in the dedication is to make it the second party to this grant, and is to charge the citizens with making, paving, repairing, and lighting the road? Is it any indefinite number of men, unorganized and unassociated, who may happen to be passers over a way that an individual has laid open through his own land? I submit that this is not the public whose voices or whose feet are to settle the question of acceptance or adoption. I think that it must be an *organized* public; the public authorities, those who are the authorized officials of the citizens, and intrusted with the power and the duty of providing proper, convenient, and sufficient highways. I think *this* is the public, and that none but this is the public whose assent is necessary. If this be not admitted, all the provisions of the statutes with regard to the laying out of roads become entirely useless.

This assent and acceptance is properly a matter of political and municipal authority; it is an exercise of a public power in a regular manner, for a legitimate purpose, by the authorized body; and I deny that the people of any town or city in this Commonwealth can be charged with the expense of maintaining a public road, without such regular action of the body upon whom this duty has devolved. I deny that any individual choosing to throw open his land, or the people passing over it, how many soever they may be, or however frequently or however long they may pass over it, can make such a charge upon the town. This seems to me to be wholly inconsistent with the principles of the law upon the subject of highways. The laying out of roads has always been made a matter of *judicature;* and a distinct and well-known tribunal passes judgment upon what roads are necessary or convenient for the public. Is it not well settled, that, before the selectmen can lay out a

road, it must be adjudged necessary or convenient? And have not the proceedings in laying out roads been quashed on *certiorari*, in more than a hundred instances, for want of an averment that the proposed road was convenient or necessary? But no competent tribunal has passed upon the convenience or necessity of this street. It may be mentioned further, that, when ways have been laid out by the selectmen according to the statute, they are to be reported to the town, and so formally entered among its highways. I therefore submit that there is no power, by an irregular proceeding, to put upon the city of Boston the charge of making, paving, and repairing a street that has not been adjudged by some competent tribunal to be necessary or convenient. The power of such a tribunal is not to be transferred to any individual who may choose to open a way through his land and dedicate it to the public, nor to those who make use of the way so opened.

I say nothing here, and I mean to say nothing here, to attack the soundness of the decision in the case of Hobbs *v.* Lowell. For I do admit that, where an individual has made a dedication of land to a town, and the town, even informally, has accepted that dedication, (and a liberal construction should doubtless be given to its acts in this respect,) the town will remain charged with the expense arising from the public use of the land; but without a judgment, in some form, from a competent tribunal, that the way so obtained is necessary, I cannot see that there is any power so to accept it.

In the old laws, before the revision of the statutes, not essentially changed in this respect, the statute of 1786, ch. 67,* gives to the Court of Sessions the power to lay out roads between town and town. The first requisite for the selectmen in laying out a road is made its common necessity and convenience; then it instructs them how to lay it out; then it gives an appeal to the Court of Sessions (now to the County Commissioners). When the selectmen laid out a road, it was as a court of judicature. And could any thing be more proper than this? Have not the men in the towns interested, the tax-payers, a right to be heard and considered, before they are charged with such an expense? Here we have a judicial examination, proceeding

* 1 Laws, 295.

upon hearing, and proof of the necessity of the case; and is not this wholly inconsistent with the doctrine of making streets by dedication, without any hearing, or proof, or pronunciation of judgment? The Revised Statutes adhere to the same principle as the former law, and declare that the streets of a city are to be regarded as public highways.

The practice of the city of Boston is also wholly opposed to the idea, that any person can impose upon it the charge of maintaining any land that he chooses to lay out as a public highway. By the city ordinance,* and in accordance with an act of the legislature, passed March 16th, 1833, it is provided, with regard to sidewalks in the city, that the city surveyor may adopt them as public property, if they are relinquished to the city, in writing, by the owner. Now, even if a gentleman builds his house back six feet from the street, and makes a sidewalk between it and the street, and every body walks upon it in passing to and fro; yet, until he makes a written relinquishment of the land, the city is not charged with its maintenance and repairs. There must be a written relinquishment. This is the Boston mode of dedication; and any amount of expense, ten thousand people running over it every day, does not make it public property, until he has made such written dedication. It would not make public property of a sidewalk, of a little strip six feet by twenty; but what is contended in this case? Why, that, without any writing at all, the city may not only so dedicate property, but may also in silence accept the dedication, and charge itself with the expense of maintaining a road. If there is any meaning in this law about a little strip of bricks, it indicates the principle which ought to govern this whole subject.

By an act passed† in the year 1816, a power was conferred on the selectmen, now transferred to the city government, to keep a record of all streets and ways laid out, and in all acts and proceedings relating thereto it provides that certified copies of this record shall be evidence. We have a right to call for the record of this street. No record is produced, and the presumption is, that there is no street. There is no record, and the presumption must be, that they made such a record in all cases without neglect. It was their duty to record any street made

* Ordinances, p. 258. † Ibid., p. 257.

in any way. The law is, that all streets shall be recorded. These are broad directions. I use them in evidence, and argue directly from them, that, since there is no record, there is no street. But it is also to be remembered, that an *intention* to make a street is necessary to the case of the complainants, and if the city government had such intention, it must be presumed that they would have attended to their duty, and recorded it. What would be the consequence of admitting that any individual might throw open his land, and that, by the concurrence of a few others, a street might be made, and the expense of maintaining it thrown upon the corporation? Such an admission takes away this whole subject from the legitimate tribunal provided for the protection of the public. When would there ever be any want of persons to travel over streets, however numerous they might be? There is some convenience in having parallel streets. Suppose that a street should be laid out through the whole length of the town, parallel to Washington Street, at thirty feet distance from it; does any one doubt that it would be filled? Or another, and another, thirty feet apart? There is travel enough to fill all. Does any body say that, in that case, any indefinite number of persons, passing over these new thoroughfares, would make them streets or highways, for the support of which the city would be charged? I hold that this would be inconsistent with our whole system of legislation and jurisprudence on the subject.

I take the clear result of the American cases, with regard to dedication, to be, that dedications are grants made to the corporation for the use of the public; that is to say, in this case, if there were a dedication, it must have been a dedication to the city of Boston, for the use of the people of Boston. The city government is then the party whose assent is necessary to make the dedication good.

There are three cases decided by the Supreme Court of the United States, which I will allude to, without turning to the books. They are those of Cincinnati *v.* Simms, 6 Peters; Barclay *v.* Howell, 6 Peters; United States *v.* New Orleans, 10 Peters.

These decisions sufficiently establish it, that the American law upon the subject of dedication makes the property enure to the corporation for the use of the public.

I have been speaking of the grantor, and I now recur to the question, What acts are necessary to prove an acceptance by the grantee? And in this case, the grantor and grantee being the same, the acts are of course to be taken together. But I have endeavored to show, that, if the dedication had been made by an individual, the *city* has done nothing which can be construed into an acceptance, and that, if it has been accepted at all, it has only been by this indefinite mass of people who have passed over it. But I may go further. If this was a sufficient act of *acceptance*, it would not be sufficient to charge the city. If they had thus accepted it, they would only take the charge of maintaining a road and keeping it in repair; but for a dedication, and a performance of the singular act of dedicating to themselves, certainly some formal act, some declaration of intention, would be necessary.

Let us inquire then, first, what acts there are that are relied upon to show a dedication and acceptance by the city; and, secondly, what evidence there is of any understanding or opinion of the Providence Railroad Company, touching the existence of a way.

In the first place, the city has done no act which looks like acceptance. It has made no record, it has undertaken no repairs, it has not touched it in any way. It has treated it exactly like its own property, like waste lands that it had no occasion to use, and not at all like a highway that it was bound to support. It would not be tolerated that I should go over all the evidence upon this point, but there are a few things to which I will allude. They say that there was a fence built upon the north line of this land, and intended to mark it out as a street. This was a slight circumstance, which was hardly recollected by Mr. Winslow Lewis, who testified to it, and which was satisfactorily explained by Mr. Fuller and others. There was an inclosure of a nuisance, on the lands to the north of this, and part of the fence came nearly upon this line. Mr. Lee (the agent of the railroad) is mistaken, surely, with regard to there having been any fence on the south side. The exhibit shows, that Mr. Lewis was authorized to see if the plaintiffs' fence was an encroachment, and on the 10th of October, 1836, he reported that it was an encroachment on the *public lands*, not on the street; and in December, 1836, we find that the Mayor is au-

thorized to notify the railroad company to remove its encumbrance from the city lands, — from *the city lands*. The company not having done this, an order was passed, in 1838, that the city marshal should remove this encroachment on the city lands. Here we find that this encroachment of nineteen feet on one end of the line, and not so much on the other, was repeatedly called and denominated an encroachment on the public land. Why did these parties not then remonstrate against this claim of the city? I admit that the city might have removed an encumbrance from the street, but it did not come to the matter in that way.

In 1838, the possession of the railroad company was interrupted, disturbed, denounced, resisted, and repelled by the entry upon it of the city marshal, and all this upon the ground, that the land upon which the fence stood was city property; and this they did not deny.

Then there was the drain, built to drain Pleasant Street, constructed by the railroad corporation, at its own expense, to keep the water from this land. If this was a street, why had not the railroad corporation, so much interested in the matter in every way, demanded that the city should put it in repair?

At the time of the extension of Eliot Street in 1839, this is spoken of as a street laid out. Every witness, Mr. Patrick T. Jackson and the others, goes back to the supposed original laying out by the vote of the town in 1794. Whenever they speak of it as a street laid out, they evidently refer to that occurrence. Not a single witness goes on the ground that this is a street made so by dedication. The whole idea of dedication had its origin in the chambers of counsel; we hear nothing of it out of doors.

There is other testimony to this point, from Messrs. Ellis and Dunham, that they considered this a part of the salable lands of the city at the time of the application made by Purkitt and others, in relation to the extension of Eliot Street.

The complainants put in as a part of their case the receipt by the city of the plan of the location of the Providence Railroad. That plan was only a sort of project, which could bind nobody. Church Street was laid down upon it, although it was then not a street. There are, indeed, no names upon the plan, which was only a project or proposal. It is agreed even

by their own evidence, that there was no street there. The object of the plan was only to show the course of the Providence Railroad in entering the city.

Then as to the view taken by the Providence Railroad Company. The first act is the report of the directors upon the location of the road, set forth in the plaintiffs' exhibit. On the 5th of March, 1833, a committee was appointed to purchase such lands as the company might require, and to fix the location of the road in the city. They reported on the 7th of September following, and this location is described as being "along the southern line of the city lands at the southwest corner of the Common." They here speak of their boundary as being the *city land.* If there were any other evidence to control this declaration, it might be made out that there was a street between; but when so important a matter as the laying out of a railroad is spoken of, and the street is not mentioned, it is difficult to believe that they thought it existed.

They filled up, built, and made the road-way themselves.* They had before called it the "city land" in their report. They now made the road over it for their own use, built a sidewalk, and removed a drain that interfered with their use. In short, every thing, every word and act of all parties, from 1833 down to the time of filing this bill, is consistent in support of the idea that the land was city property, used by the Providence Railroad Company under a *revocable license*, to be withdrawn whenever the great object constantly kept in mind by the city government (a sale of the land) could be effected. And there is not a single act which looks as if either party supposed that the city was bound to keep a passable way over these lands.

That it was understood that this use of the land by the corporation was matter of license, I refer your honors to the testimony of Messrs. Gurney, Hunting, Eliot,† and Armstrong.‡ Mr. Gurney testifies that somebody came to speak to him upon this subject, whom he supposed to represent the railroad company, and he said that he had no objection to their use of the land for the present. There is no necessity of proving that this person came from the railroad company. These gentlemen

* Revere, cross-examination, thirteenth answer.
† Fourth cross-interrogatory.
‡ Fifth direct and fourth cross interrogatory.

thought that he asked for a license, and they gave what they thought was necessary; and this is totally inconsistent with the idea of a dedication of the land. But still more, after the land was offered for sale, they offered to buy it. Mr. Grennell, the president of the company, offered to buy it at any fair price, and this in the presence of Mr. Sturgis and Mr. Dalton. Mr. Grennell admits that he offered to buy it, but says that just before the bargain was concluded this suggestion arose, that perhaps the land might be considered as a public street. He said he wished to buy it if it was to be used for other purposes, but if it was to remain a street, it would answer their purposes as well as if it were their own. It might be said that Mr. Grennell made this proposition from a want of local knowledge; but how is it with Mr. Sturgis and Mr. Dalton? Do they know any thing about Boston? Does any body know more? There was an opinion, probably, that this might be a street; but when they considered it as a street they referred to the acts of the town in 1794, and if your honors should decide to make this injunction perpetual, on the ground of a dedication, you would surprise the directors of the railroad company as much as you would any one. The city government of Boston, and all the citizens of Boston, would wonder what act or proceeding of theirs had given this land away; and the railroad company would wonder most of all, how, if there was no old street there laid out in 1794, they had gained their cause; and that while floating on a sea of doubt and uncertainty, after drifting away from that anchorage, they should now be picked up and saved by this poctrine of *dedication*.

The Rhode Island Government*

THE facts necessary to the understanding of these cases are sufficiently set forth in the commencement of Mr. Webster's argument. The event out of which the cases arose is known in popular language as the *Dorr Rebellion*. The first case came up by writ of error from the Circuit Court of Rhode Island, in which the jury, under the rulings of the court (Mr. Justice Story), found a verdict for the defendants; the second case came up by a certificate of a division of opinion. The allegations, evidence, and arguments were the same in both cases.

The first case was argued by Mr. Hallet and Mr. Clifford (Attorney-General) for the plaintiffs in error, and by Mr. Whipple and Mr. Webster for the defendants in error. Mr. Justice Catron, Mr. Justice Daniel, and Mr. Justice McKinley were absent from the court, in consequence of ill health. Chief Justice Taney delivered the opinion of the court, affirming the judgment of the court below in the first case, and dismissing the second for want of jurisdiction. Mr. Justice Woodbury dissented, and delivered a very elaborate opinion in support of his view of the subject.

THERE is something novel and extraordinary in the case now before the court. All will admit that it is not such a one as is usually presented for judicial consideration.

It is well known, that in the years 1841 and 1842 political agitation existed in Rhode Island. Some of the citizens of that State undertook to form a new constitution of government, beginning their proceedings towards that end by meetings of the people, held without authority of law, and conducting those pro-

* An Argument made in the Supreme Court of the United States, on the 27th of January, 1848, in the case of Martin Luther against Luther M. Borden and others. The case of Rachel Luther against the same defendants was before the court at the same time.

ceedings through such forms as led them, in 1842, to say that they had established a new constitution and form of government, and placed Mr. Thomas W. Dorr at its head. The previously existing, and then existing, government of Rhode Island treated these proceedings as nugatory, so far as they went to establish a new constitution; and criminal, so far as they proposed to confer authority upon any persons to interfere with the acts of the existing government, or to exercise powers of legislation, or administration of the laws. All will remember that the state of things approached, if not actual conflict between men in arms, at least the "perilous edge of battle." Arms were resorted to, force was used, and greater force threatened. In June, 1842, this agitation subsided. The new government, as it called itself, disappeared from the scene of action. The former government, the Charter government, as it was sometimes styled, resumed undisputed control, went on in its ordinary course, and the peace of the State was restored.

But the past had been too serious to be forgotten. The legislature of the State had, at an early stage of the troubles, found it necessary to pass special laws for the punishment of the persons concerned in these proceedings. It defined the crime of treason, as well as smaller offences, and authorized the declaration of martial law. Governor King, under this authority, proclaimed the existence of treason and rebellion in the State, and declared the State under martial law. This having been done, and the ephemeral government of Mr. Dorr having disappeared, the grand juries of the State found indictments against several persons for having disturbed the peace of the State, and one against Dorr himself for treason. This indictment came on in the Supreme Court of Rhode Island in 1844, before a tribunal admitted on all hands to be the legal judicature of the State. He was tried by a jury of Rhode Island, above all objection, and after all challenge. By that jury, under the instructions of the court, he was convicted of treason, and sentenced to imprisonment for life.

Now an action is brought in the courts of the United States, and before your honors, by appeal, in which it is attempted to prove that the characters of this drama have been oddly and wrongly cast; that there has been a great mistake in the courts of Rhode Island. It is alleged, that Mr. Dorr, instead of being

a traitor or an insurrectionist, was the real governor of the State at the time; that the force used by him was exercised in defence of the constitution and laws, and not against them; that he who opposed the constituted authorities was not Mr. Dorr, but Governor King; and that it was *he* who should have been indicted, and tried, and sentenced. This is rather an important mistake, to be sure, if it be a mistake. "Change places," cries poor Lear, "*change places*, and *handy-dandy*, which is the justice and which the thief?" So our learned opponents say, "Change places, and, *handy-dandy*, which is the governor and which the rebel?" The aspect of the case is, as I have said, novel. It may perhaps give vivacity and variety to judicial investigations. It may relieve the drudgery of perusing briefs, demurrers, and pleas in bar, bills in equity and answers, and introduce topics which give sprightliness, freshness, and something of an uncommon public interest to proceedings in courts of law.

However difficult it may be, and I suppose it to be *wholly* impossible, that this court should take judicial cognizance of the questions which the plaintiff has presented to the court below, yet I do not think it a matter of regret that the cause has come hither. It is said, and truly said, that the case involves the consideration and discussion of what are the true principles of government in our American system of public liberty. This is very right. The case does involve these questions, and harm can never come from their discussion, especially when such discussion is addressed to reason and not to passion; when it is had before magistrates and lawyers, and not before excited masses out of doors. I agree entirely that the case does raise considerations, somewhat extensive, of the true character of our American system of popular liberty; and although I am constrained to differ from the learned counsel who opened the cause for the plaintiff in error, on the principles and character of that American liberty, and upon the true characteristics of that American system on which changes of the government and constitution, if they become necessary, are to be made, yet I agree with him that this case does present them for consideration.

Now, there are certain principles of public liberty, which, though they do not exist in all forms of government, exist, nevertheless, to some extent in different forms of government. The

protection of life and property, the *habeas corpus*, trial by jury, the right of open trial, these are principles of public liberty existing in their best form in the republican institutions of this country, but, to the extent mentioned, existing also in the constitution of England. Our American liberty, allow me to say, therefore, has an ancestry, a pedigree, a history. Our ancestors brought to this continent all that was valuable, in their judgment in the political institutions of England, and left behind them all that was without value, or that was objectionable. During the colonial period they were closely connected of course with the colonial system; but they were Englishmen, as well as colonists, and took an interest in whatever concerned the mother country, especially in all great questions of public liberty in that country. They accordingly took a deep concern in the revolution of 1688. The American colonists had suffered from the tyranny of James the Second. Their charters had been wrested from them by mockeries of law, and by the corruption of judges in the city of London; and in no part of England was there more gratification, or a more resolute feeling, when James abdicated and William came over, than in the American colonies. All know that Massachusetts immediately overthrew what had been done under the reign of James, and took possession of the colonial fort in the harbor of Boston in the name of the new king.

When the United States separated from England, by the Declaration of 1776, they departed from the political maxims and examples of the mother country, and entered upon a course more exclusively American. From that day down, our institutions and our history relate to ourselves. Through the period of the Declaration of Independence, of the Confederation, of the Convention, and the adoption of the Constitution, all our public acts are records out of which a knowledge of our system of American liberty is to be drawn.

From the Declaration of Independence, the governments of what had been colonies before were adapted to their new condition. They no longer owed allegiance to crowned heads. No tie bound them to England. The whole system became entirely popular, and all legislative and constitutional provisions had regard to this new, peculiar, American character, which they had assumed. Where the form of government was already well enough, they let it alone. Where reform was necessary,

they reformed it. What was valuable, they retained; what was essential, they added; and no more. Through the whole proceeding, from 1776 to the latest period, the whole course of American public acts, the whole progress of this American system, was marked by a peculiar conservatism. The object was to do what was necessary, and no more; and to do that with the utmost temperance and prudence.

Now, without going into historical details at length, let me state what I understand the American principles to be, on which this system rests.

First and chief, no man makes a question, that the people are the source of all political power. Government is instituted for their good, and its members are their agents and servants. He who would argue against this must argue without an adversary. And who thinks there is any peculiar merit in asserting a doctrine like this, in the midst of twenty millions of people, when nineteen millions nine hundred and ninety-nine thousand nine hundred and ninety-nine of them hold it, as well as himself? There is no other doctrine of government here; and no man imputes to another, and no man should claim for himself, any peculiar merit for asserting what every body knows to be true, and nobody denies. Why, where else can we look but to the people for political power, in a popular government? We have no hereditary executive, no hereditary branch of the legislature, no inherited masses of property, no system of entails, no long trusts, no long family settlements, no primogeniture. Every estate in the country, from the richest to the poorest, is divided among sons and daughters alike. Alienation is made as easy as possible; everywhere the transmissibility of property is perfectly free. The whole system is arranged so as to produce, as far as unequal industry and enterprise render it possible, a universal equality among men; an equality of rights absolutely, and an equality of condition, so far as the different characters of individuals will allow such equality to be produced. He who considers that there may be, is, or ever has been, since the Declaration of Independence, any person who looks to any other source of power in this country than the people, so as to give peculiar merit to those who clamor loudest in its assertion, must be out of his mind, even more than Don Quixote. His imagination was only perverted. He saw things not as they

were, though what he saw were things. He saw windmills, and took them to be giants, knights on horseback. This was bad enough; but whoever says, or speaks as if he thought, that any body looks to any other source of political power in this country than the people, must have a stronger and wilder imagination, for he sees nothing but the creations of his own fancy. He stares at phantoms.

Well, then, let all admit, what none deny, that the only source of political power in this country is the people. Let us admit that they are *sovereign*, for they are so; that is to say, the aggregate community, the collected will of the people, is sovereign. I confess that I think Chief Justice Jay spoke rather paradoxically than philosophically, when he said that this country exhibited the extraordinary spectacle of many sovereigns and no subjects. The people, he said, are all sovereigns; and the peculiarity of the case is that they have no subjects, except a few colored persons. This must be rather fanciful. The aggregate community is sovereign, but that is not *the* sovereignty which acts in the daily exercise of sovereign power. The people cannot act daily as the people. They must establish a government, and invest it with so much of the sovereign power as the case requires; and this sovereign power being delegated and placed in the hands of the government, that government becomes what is popularly called THE STATE. I like the old-fashioned way of stating things as they are; and this is the true idea of a state. It is an organized government, representing the collected will of the people, as far as they see fit to invest that government with power. And in that respect it is true, that, though *this* government possesses sovereign power, it does not possess *all* sovereign power; and so the State governments, though sovereign in some respects, are not so in all. Nor could it be shown that the powers of both, as delegated, embrace the whole range of what might be called sovereign power. We usually speak of the States as sovereign States. I do not object to this. But the Constitution never so styles them, nor does the Constitution speak of the government here as the *general* or the *federal* government. It calls this government the United States; and it calls the State governments State governments. Still the fact is undeniably so; legislation is a sovereign power, and is exercised by the United States government to a certain extent, and

John Jay

From the Painting by Gilbert Stuart, now in the
Bedford (Jay) House, Katonah, N. Y.

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also by the States, according to the forms which they themselves have established, and subject to the provisions of the Constitution of the United States.

Well, then, having agreed that all power is originally from the people, and that they can confer as much of it as they please, the next principle is, that, as the exercise of legislative power and the other powers of government immediately by the people themselves is impracticable, they must be exercised by REPRESENTATIVES of the people; and what distinguishes American governments as much as any thing else from any governments of ancient or of modern times, is the marvellous felicity of their representative system. It has with us, allow me to say, a somewhat different origin from the representation of the commons in England, though that has been worked up to some resemblance of our own. The representative system in England had its origin, not in any supposed rights of the people themselves, but in the necessities and commands of the crown. At first, knights and burgesses were summoned, often against their will, to a Parliament called by the king. Many remonstrances were presented against sending up these representatives; the charge of paying them was, not unfrequently, felt to be burdensome by the people. But the king wished their counsel and advice, and perhaps the presence of a popular body, to enable him to make greater headway against the feudal barons in the aristocratic and hereditary branch of the legislature. In process of time these knights and burgesses assumed more and more a popular character, and became, by degrees, the guardians of popular rights. The people through them obtained protection against the encroachments of the crown and the aristocracy, till in our day they are understood to be the representatives of the people, charged with the protection of their rights. With us it was always just so. Representation has always been of this character. The power is with the people; but they cannot exercise it in masses or *per capita;* they can only exercise it by their representatives. The whole system with us has been popular from the beginning.

Now, the basis of this representation is suffrage. The right to choose representatives is every man's part in the exercise of sovereign power; to have a voice in it, if he has the proper qualifications, is the portion of political power belonging to

every elector. That is the beginning. That is the mode in which power emanates from its source, and gets into the hands of conventions, legislatures, courts of law, and the chair of the executive. It begins in suffrage. Suffrage is the delegation of the power of an individual to some agent.

This being so, then follow two other great principles of the American system.

1. The first is, that the right of suffrage shall be guarded, protected, and secured against force and against fraud; and,

2. The second is, that its exercise shall be prescribed by previous law; its qualifications shall be prescribed by previous law; the time and place of its exercise shall be prescribed by previous law; the manner of its exercise, under whose supervision (always sworn officers of the law), is to be prescribed. And then, again, the results are to be certified to the central power by some certain rule, by some known public officers, in some clear and definite form, to the end that two things may be done: first, that every man entitled to vote may vote; second, that his vote may be sent forward and counted, and so he may exercise his part of sovereignty, in common with his fellow-citizens.

In the exercise of political power through representatives we know nothing, we never have known any thing, but such an exercise as should take place through the prescribed forms of law. When we depart from that, we shall wander as widely from the American track as the pole is from the track of the sun.

I have said that it is one principle of the American system, that the people limit their governments, National and State. They do so; but it is another principle, equally true and certain, and, according to my judgment of things, equally important, that the people often *limit themselves*. They set bounds to their own power. They have chosen to secure the institutions which they establish against the sudden impulses of mere majorities. All our institutions teem with instances of this. It was their great conservative principle, in constituting forms of government, that they should secure what they had established against hasty changes by simple majorities. By the fifth article of the Constitution of the United States, Congress, two thirds of both houses concurring, may propose amendments of the Constitution; or, on the application of the legislatures of two thirds of

the States, may call a convention; and amendments proposed in either of these forms must be ratified by the legislatures or conventions of three fourths of the States. The fifth article of the Constitution, if it was made a topic for those who framed the "people's constitution" of Rhode Island, could only have been a matter of reproach. It gives no countenance to any of their proceedings, or to any thing like them. On the contrary, it is one remarkable instance of the enactment and application of that great American principle, that the constitution of government should be cautiously and prudently interfered with, and that changes should not ordinarily be begun and carried through by bare majorities.

But the people limit themselves also in other ways. They limit themselves in the first exercise of their political rights. They limit themselves, by all their constitutions, in two important respects; that is to say, in regard to the qualifications of *electors*, and in regard to the qualifications of the *elected*. In every State, and in all the States, the people have precluded themselves from voting for every body they might wish to vote for; they have limited their own right of choosing. They have said, We will elect no man who has not such and such qualifications. We will not vote ourselves, unless we have such and such qualifications. They have also limited themselves to certain prescribed forms for the conduct of elections. They must vote at a particular place, at a particular time, and under particular conditions, or not at all. It is in these modes that we are to ascertain the will of the American people; and our Constitution and laws know no other mode. We are not to take the will of the people from public meetings, nor from tumultuous assemblies, by which the timid are terrified, the prudent are alarmed, and by which society is disturbed. These are not American modes of signifying the will of the people, and they never were. If any thing in the country, not ascertained by a regular vote, by regular returns, and by regular representation, has been established, it is an exception, and not the rule; it is an anomaly which, I believe, can scarcely be found.

It is true that at the Revolution, when all government was immediately dissolved, the people got together, and what did they do? Did they exercise sovereign power? They began an inceptive organization, the object of which was to bring to-

gether representatives of the people, who should form a government. This was the mode of proceeding in those States where their legislatures were dissolved. It was much like that had in England upon the abdication of James the Second. He ran away, he abdicated. He threw the great seal into the Thames. I am not aware that, on the 4th of May, 1842, any great seal was thrown into Providence River! But James abdicated, and King William took the government; and how did he proceed? Why, he at once requested all who had been members of the old Parliament, of any regular Parliament in the time of Charles the Second, to assemble. The Peers, being a standing body, could of course assemble; and all they did was to recommend the calling of a convention, to be chosen by the same electors, and composed of the same numbers, as composed a Parliament. The convention assembled, and, as all know, was turned into a Parliament. This was a case of necessity, a revolution. Don't we call it so? And why? Not merely because a new sovereign then ascended the throne of the Stuarts, but because there was a change in the organization of the government. The legal and established succession was broken. The convention did not assemble under any preceding law. There was a *hiatus*, a syncope, in the action of the body politic. This was revolution, and the Parliaments that assembled afterwards referred their legal origin to that revolution.

Is it not obvious enough, that men cannot get together and count themselves, and say they are so many hundreds and so many thousands, and judge of their own qualifications, and call themselves the people, and set up a government? Why, another set of men, forty miles off, on the same day, with the same propriety, with as good qualifications, and in as large numbers, may meet and set up another government; one may meet at Newport and another at Chepachet, and both may call themselves the people. What is this but anarchy? What liberty is there here but a tumultuary, tempestuous, violent, stormy liberty, a sort of South American liberty, without power except in its spasms, a liberty supported by arms to-day, crushed by arms to-morrow? Is that *our* liberty?

The regular action of popular power, on the other hand, places upon public liberty the most beautiful face that ever adorned that angel form. All is regular and harmonious in its

features, and gentle in its operation. The stream of public authority, under American liberty, running in this channel, has the strength of the Missouri, while its waters are as transparent as those of a crystal lake. It is powerful for good. It produces no tumult, no violence, and no wrong;

> "Though deep, yet clear; though gentle, yet not dull;
> Strong, without rage; without o'erflowing, full."

Another American principle growing out of this, and just as important and well settled as is the truth that the people are the source of power, is, that, when in the course of events it becomes necessary to ascertain the will of the people on a new exigency, or a new state of things or of opinion, the legislative power provides for that ascertainment by an ordinary act of legislation. Has not that been our whole history? It would take me from now till the sun shall go down to advert to all the instances of it, and I shall only refer to the most prominent, and especially to the establishment of the Constitution under which you sit. The old Congress, upon the suggestion of the delegates who assembled at Annapolis in May, 1786, recommended to the States that they should send delegates to a convention to be holden at Philadelphia to form a Constitution. No article of the old Confederation gave them power to do this; but they did it, and the States did appoint delegates, who assembled at Philadelphia, and formed the Constitution. It was communicated to the old Congress, and that body recommended to the States to make provision for calling the people together to act upon its adoption. Was not that exactly the case of passing a law to ascertain the will of the people in a new exigency? And this method was adopted without opposition, nobody suggesting that there could be any other mode of ascertaining the will of the people.

My learned friend went through the constitutions of several of the States. It is enough to say, that, of the old thirteen States, the constitutions, with but one exception, contained no provision for their own amendment. In New Hampshire there was a provision for taking the sense of the people once in seven years. Yet there is hardly one that has not altered its constitution, and it has been done by conventions called by the legislature, as an ordinary exercise of legislative power. Now what State ever altered its constitution in any other mode?

What alteration has ever been brought in, put in, forced in, or got in any how, by resolutions of mass meetings, and then by applying force? In what State has an assembly, calling itself the people, convened without law, without authority, without qualifications, without certain officers, with no oaths, securities, or sanctions of any kind, met and made a constitution, and called it the constitution of the STATE? There must be some authentic mode of ascertaining the will of the people, else all is anarchy. It resolves itself into the law of the strongest, or, what is the same thing, of the most numerous for the moment, and all constitutions and all legislative rights are prostrated and disregarded.

But my learned adversary says, that, if we maintain that the people (for he speaks in the name and on behalf of the people, to which I do not object) cannot commence changes in their government but by some previous act of legislation, and if the legislature will not grant such an act, we do in fact follow the example of the Holy Alliance, "the doctors of Laybach," where the assembled sovereigns said that all changes of government must proceed from sovereigns; and it is said that we mark out the same rule for the people of Rhode Island.

Now, will any man, will my adversary here, on a moment's reflection, undertake to show the least resemblance on earth between what I have called the American doctrine, and the doctrine of the sovereigns at Laybach? What do I contend for? I say that the will of the people must prevail, when it is ascertained; but there must be some legal and authentic mode of ascertaining that will; and then the people may make what government they please. Was that the doctrine of Laybach? Was not the doctrine there held this, that the *sovereigns* should say what changes shall be made? Changes must proceed from them; new constitutions and new laws emanate from them; and all the people had to do was to submit. That is what they maintained. All changes began with the sovereigns, and ended with the sovereigns. Pray, at about the time that the Congress of Laybach was in session, did the allied powers put it to the people of Italy to say what sort of change they would have? And at a more recent date, did they ask the citizens of Cracow what change they would have in their constitution? Or did they take away their constitution, laws, and liberties, by

their own sovereign act? All that is necessary here is, that the will of the people should be ascertained, by some regular rule of proceeding, prescribed by previous law. But when ascertained, that will is as sovereign as the will of a despotic prince, of the Czar of Muscovy, or the Emperor of Austria himself, though not quite so easily made known. A ukase or an edict signifies at once the will of a despotic prince; but that will of the people, which is here as sovereign as the will of such a prince, is not so quickly ascertained or known; and thence arises the necessity for suffrage, which is the mode whereby each man's power is made to tell upon the constitution of the government, and in the enactment of laws.

One of the most recent laws for taking the will of the people in any State is the law of 1845, of the State of New York. It begins by recommending to the people to assemble in their several election districts, and proceed to vote for delegates to a convention. If you will take the pains to read that act, it will be seen that New York regarded it as an ordinary exercise of legislative power. It applies all the penalties for fraudulent voting, as in other elections. It punishes false oaths, as in other cases. Certificates of the proper officers were to be held conclusive, and the will of the people was, in this respect, collected essentially in the same manner, supervised by the same officers, under the same guards against force and fraud, collusion and misrepresentation, as are usual in voting for State or United States officers.

We see, therefore, from the commencement of the government under which we live, down to this late act of the State of New York, one uniform current of law, of precedent, and of practice, all going to establish the point that changes in government are to be brought about by the will of the people, assembled under such legislative provisions as may be necessary to ascertain that will, truly and authentically.

In the next place, may it please your honors, it becomes very important to consider what bearing the Constitution and laws of the United States have upon this Rhode Island question. Of course the Constitution of the United States recognizes the existence of States. One branch of the legislature of the United States is composed of Senators, appointed by the

States, in their State capacities. The Constitution of the United States* says that "the United States shall guaranty to each State a republican form of government, and shall protect the several States against invasion; and on application of the legislature, or of the executive, when the legislature cannot be convened, against domestic violence." Now, I cannot but think this a very stringent article, drawing after it the most important consequences, and all of them *good* consequences. The Constitution, in the section cited, speaks of States as having existing legislatures and existing executives; and it speaks of cases in which violence is practised or threatened against the State, in other words, "domestic violence"; and it says the State shall be protected. It says, then, does it not? that the existing government of a State shall be protected. My adversary says, if so, and if the legislature would not call a convention, and if, when the people rise to make a constitution, the United States step in and prohibit them, why, the rights and privileges of the people are checked, controlled. Undoubtedly. The Constitution does not proceed on the *ground* of revolution; it does not proceed on any *right* of revolution; but it does go on the idea, that, within and under the Constitution, no new form of government can be established in any State, without the authority of the existing government.

Admitting the legitimacy of the argument of my learned adversary, it would not authorize the inference he draws from it, because his own case falls within the same range. He has proved, he thinks, that there was an existing government, a paper government, at least; a rightful government, as he alleges. Suppose it to be rightful, in his sense of right. Suppose three fourths of the people of Rhode Island to have been engaged in it, and ready to sustain it. What then? How is it to be done without the consent of the previous government? How is the fact, that three fourths of the people are in favor of the new government, to be legally ascertained? And if the existing government deny that fact, and if that government hold on, and will not surrender till displaced by force, and if it is threatened by force, then the case of the Constitution arises, and the United States must aid the government that is in, because an attempt to displace a government by force is "domestic violence."

* Art. IV. § 4.

It is the exigency provided for by the Constitution. If the existing government maintain its post, though three fourths of the State have adopted the new constitution, is it not evident enough that the exigency arises in which the constitutional power here must go to the aid of the existing government? Look at the law of 28th February, 1795.* Its words are, "And in case of an insurrection in any State, *against the government thereof*, it shall be lawful for the President of the United States, on application of the legislature of such State, or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection." Insurrection against the *existing* government is, then, the thing to be suppressed.

But the law and the Constitution, the whole system of American institutions, do not contemplate a case in which a resort will be necessary to proceedings *aliunde*, or outside of the law and the Constitution, for the purpose of amending the frame of government. They go on the idea that the States are all republican, that they are all representative in their forms, and that these popular governments in each State, the annually created creatures of the people, will give all proper facilities and necessary aids to bring about changes which the people may judge necessary in their constitutions. They take that ground and act on no other supposition. They assume that the popular will in all particulars will be accomplished. And history has proved that the presumption is well founded.

This, may it please your honors, is the view I take of what I have called the American system. These are the methods of bringing about changes in government.

Now, it is proper to look into this record, and see what the questions are that are presented by it, and consider, —

1. Whether the case is one for judicial investigation at all; that is, whether this court can try the matters which the plaintiff has offered to prove in the court below; and

2. In the second place, whether many things which he did offer to prove, if they could have been and had been proved, were not acts of criminality, and therefore no justification; and

3. Whether all that was offered to be proved would show

* Statutes at Large, Vol. I. p. 424.

that, in point of fact, there had been established and put in operation any new constitution, displacing the old charter government of Rhode Island.

The declaration is in trespass. The writ was issued on the 8th of October, 1842, in which Martin Luther complains that Luther M. Borden and others broke into his house in Warren, Rhode Island, on the 29th of June, 1842, and disturbed his family and committed other illegal acts.

The defendant answers, that large numbers of men were in arms, in Rhode Island, for the purpose of overthrowing the government of the State, and making war upon it; and that, for the preservation of the government and people, martial law had been proclaimed by the Governor, under an act of the legislature, on the 25th of June, 1842. The plea goes on to aver, that the plaintiff was aiding and abetting this attempt to overthrow the government, and that the defendant was under the military authority of John T. Child, and was ordered by him to arrest the plaintiff; for which purpose he applied at the door of his house, and being refused entrance he forced the door.

The action is thus for an alleged trespass, and the plea is justification under the law of Rhode Island. The plea and replications are as usual in such cases in point of form. The plea was filed at the November term of 1842, and the case was tried at the November term of 1843, in the Circuit Court in Rhode Island. In order to make out a defence, the defendant offered the charter of Rhode Island, the participation of the State in the Declaration of Independence, its uniting with the Confederation in 1778, its admission into the Union in 1790, its continuance in the Union and its recognition as a State down to May, 1843, when the constitution now in force was adopted. Here let it be particularly remarked, that Congress admitted Rhode Island into the Constitution under this identical old charter government, thereby giving sanction to it as a republican form of government. The defendant then refers to all the laws and proceedings of the Assembly, till the adoption of the present constitution of Rhode Island. To repel the case of the defendant, the plaintiff read the proceedings of the old legislature, and documents to show that the idea of changing the government had been entertained as long ago as 1790. He read also certain resolutions of the Assembly in 1841, memorials praying changes in the constitution, and other documents to the

same effect. He next offered to prove that suffrage associations were formed throughout the State in 1840 and 1841, and that steps were taken by them for holding public meetings; and to show the proceedings had at those meetings. In the next place, he offered to prove that a mass convention was held at Newport, attended by over four thousand persons, and another at Providence, at which over six thousand attended, at which resolutions were passed in favor of the change. Then he offered to prove the election of delegates; the meeting of the convention in October, 1841, and the draughting of the Dorr constitution; the reassembling in 1841, the completion of the draught, its submission to the people, their voting upon it, its adoption, and the proclamation on the 13th of January, 1842, that the constitution so adopted was the law of the land.

That is the substance of what was averred as to the formation of the Dorr constitution. The plaintiff next offered to prove that the constitution was adopted by a large majority of the qualified voters of the State; that officers were elected under it in April, 1842; that this new government assembled on the 3d of May; and he offered a copy of its proceedings. He sets forth that the court refused to admit testimony upon these subjects, and to these points; and ruled that the old government and laws of the State were in full force and power, and then existing, when the alleged trespass was made, and that they justified the acts of the defendants, according to their plea.

I will give a few references to other proceedings of this new government. The new constitution was proclaimed on the 13th of January, 1842, by some of the officers of the convention. On the 13th of April, officers were appointed under it, and Mr. Dorr was chosen governor. On Tuesday, the 3d of May, the new legislature met, was organized, and then, it is insisted, the new constitution became the law of the land. The legislature sat through that whole day, morning and evening; adjourned; met the next day, and sat through all that day, morning and evening, and did a great deal of paper business. It went through the forms of choosing a Supreme Court, and transacting other business of a similar kind, and on the evening of the 4th of May it adjourned, to meet again on the first Monday of July, in Providence,

"And word spake never more."

It never reassembled. This government, then, whatever it was, came into existence on the *third* day of May, and went out of existence on the *fourth* day of May.

I will now give some references concerning the new constitution authorized by the government, the old government, and which is now the constitution of Rhode Island. It was framed in November, 1842. It was voted upon by the people on the 21st, 22d, and 23d days of November, was then by them accepted, and became by its own provisions the constitution of Rhode Island on the first Tuesday of May, 1843.

Now, what, in the mean time, had become of Mr. Dorr's government? According to the principle of its friends, they are forced to admit that it was superseded by the new, that is to say, the present government, because the people accepted the new government. But there was no new government till May, 1843. According to them, then, there was an *interregnum* of a whole year. If Mr. Dorr had had a government, what became of it? If it ever came in, what put it out of existence? Why did it not meet on the day to which it had adjourned? It was not displaced by the new constitution, because that had not been agreed upon in convention till November. It was not adopted by the people till the last of November, and it did not go into operation till May. What then had become of Mr. Dorr's government?

I think it is important to note that the new constitution, established according to the prescribed forms, came thus into operation in May, 1843, and was admitted by all to be the constitution of the State. What then happened in the State of Rhode Island? I do not mean to go through all the trials that were had after this ideal government of Mr. Dorr ceased to exist; but I will ask attention to the report of the trial of Dorr for treason, which took place in 1844, before all the judges of the Supreme Court of the State. He was indicted in August, 1842, and the trial came on in March, 1844. The indictment was found while the charter government was in force, and the trial was had under the new constitution. He was found guilty of treason. And I turn to the report of the trial now, to call attention to the language of the court in its charge, as delivered by Chief Justice Durfee. I present the following extract from that charge:—

"It may be, Gentlemen, that he really believed himself to be the governor of the State, and that he acted throughout under this delusion. However this may go to extenuate the offence, it does not take from it its legal guilt. It is no defence to an indictment for the violation of any law for the defendant to come into court and say, 'I thought that I was but exercising a constitutional right, and I claim an acquittal on the ground of mistake.' Were it so, there would be an end to all law and all government. Courts and juries would have nothing to do but to sit in judgment upon indictments, in order to acquit or excuse. The accused has only to prove that he has been systematic in committing crime, and that he thought that he had a right to commit it; and, according to this doctrine, you must acquit. The main ground upon which the prisoner sought for a justification was, that a constitution had been adopted by a majority of the male adult population of this State, voting in their primary or natural capacity or condition, and that he was subsequently elected, and did the acts charged, as governor under it. He offered the votes themselves to prove its adoption, which were also to be followed by proof of his election. This evidence we have ruled out. Courts and juries, Gentlemen, do not count votes to determine whether a constitution has been adopted or a governor elected, or not. Courts take notice, without proof offered from the bar, what the constitution is or was, and who is or was the governor of their own State. It belongs to the legislature to exercise this high duty. It is the legislature which, in the exercise of its delegated sovereignty, counts the votes and declares whether a constitution be adopted or a governor elected, or not; and we cannot revise and reverse their acts in this particular, without usurping their power. Were the votes on the adoption of our present constitution now offered here to prove that it was or was not adopted; or those given for the governor under it, to prove that he was or was not elected; we could not receive the evidence ourselves; we could not permit it to pass to the jury. And why not? Because, if we did so, we should cease to be a mere judicial, and become a political tribunal, with the whole sovereignty in our hands. Neither the people nor the legislature would be sovereign. We should be sovereign, or you would be sovereign; and we should deal out to parties litigant, here at our bar, sovereignty to this or that, according to rules or laws of our own making, and heretofore unknown in courts.

"In what condition would this country be, if appeals could be thus taken to courts and juries? *This* jury might decide one way, and *that* another, and the sovereignty might be found here to-day, and there to-morrow. Sovereignty is above courts or juries, and the creature cannot sit in judgment upon its creator. Were this instrument offered as the constitution of a foreign state, we might, perhaps, under some circumstances, require proof of its existence; but, even in that case, the fact

would not be ascertained by counting the votes given at its adoption, but by the certificate of the secretary of state, under the broad seal of the state. This instrument is not offered as a foreign constitution, and this court is bound to know what the constitution of the government is under which it acts, without any proof even of that high character. We know nothing of the existence of the so-called 'people's constitution' as law, and there is no proof before you of its adoption, and of the election of the prisoner as governor under it; and you can return a verdict only on the evidence that has passed to you."

Having thus, may it please your honors, attempted to state the questions as they arise, and having referred to what has taken place in Rhode Island, I shall present what further I have to say in three propositions: —

1st. I say, first, that the matters offered to be proved by the plaintiff in the court below are not of judicial cognizance; and proof of them, therefore, was properly rejected by the court.

2d. If all these matters could be, and had been, legally proved, they would have constituted no defence, because they show nothing but an *illegal* attempt to overthrow the government of Rhode Island.

3d. No proof was offered by the plaintiff to show that, in fact, another government had gone into operation, by which the Charter government had become displaced.

And first, these matters are not of judicial cognizance. Does this need arguing? Are the various matters of fact alleged, the meetings, the appointment of committees, the qualifications of voters, is there any one of all these matters of which a court of law can take cognizance in a case in which it is to decide on sovereignty? Are fundamental changes in the frame of a government to be thus proved? The thing to be proved is a change of the sovereign power. Two legislatures existed at the same time, both claiming power to pass laws. Both could not have a legal existence. What, then, is the attempt of our adversaries? To put down one sovereign government, and to put another up, by facts and proceedings in regard to elections out of doors, unauthorized by any law whatever. Regular proceedings for a change of government may in some cases, perhaps, be taken notice of by a court; but this court must look elsewhere than out of doors, and to public meetings, irregular and unauthorized, for the decision of such a question as this. It naturally looks to that authority under which it sits here, to the

provisions of the Constitution which have created this tribunal, and to the laws by which its proceedings are regulated. It must look to the acts of the government of the United States, in its various branches.

This Rhode Island disturbance, as every body knows, was brought to the knowledge of the President of the United States* by the public authorities of Rhode Island; and how did he treat it? The United States have guarantied to each State a republican form of government. And a law of Congress has directed the President, in a constitutional case requiring the adoption of such a proceeding, to call out the militia to put down domestic violence, and suppress insurrection. Well, then, application was made to the President of the United States, to the executive power of the United States. For, according to our system, it devolves upon the executive to determine, in the first instance, what are and what are not governments. The President recognizes governments, foreign governments, as they appear from time to time in the occurrences of this changeful world. And the Constitution and the laws, if an insurrection exists against the government of any State, rendering it necessary to appear with an armed force, make it his duty to call out the militia and suppress it.

Two things may here be properly considered. The first is, that the Constitution declares that the United States shall protect every State against domestic violence; and the law of 1795, making provision for carrying this constitutional duty into effect in all proper cases, declares, that, "in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States to call out the militia of other States to suppress such insurrection." These constitutional and legal provisions make it the indispensable duty of the President to decide, in cases of commotion, what is the rightful government of the State. He cannot avoid such decision. And in this case he decided, of course, that the existing government, the charter government, was the rightful government. He could not possibly have decided otherwise.

In the next place, if events had made it necessary to call out the militia, and the officers and soldiers of such militia, in protecting the existing government, had done precisely what the defend-

* Mr. Tyler.

ants in this case did, could an action have been maintained against them? No one would assert so absurd a proposition.

In reply to the requisition of the Governor, the President stated that he did not think it was yet time for the application of force; but he wrote a letter to the Secretary of War, in which he directed him to confer with the Governor of Rhode Island; and, whenever it should appear to them to be necessary, to call out from Massachusetts and Connecticut a militia force sufficient to *terminate at once* this insurrection, by the authority of the government of the United States. We are at no loss, therefore, to know how the executive government of the United States treated this insurrection. It was regarded as fit *to be suppressed.* That is manifest from the President's letters to the Secretary of War and to Governor King.

Now, the eye of this court must be directed to the proceedings of the general government, which had its attention called to the subject, and which did institute proceedings respecting it. And the court will learn from the proceedings of the executive branch of the government, and of the two chambers above us, how the disturbances in Rhode Island were regarded; whether they were looked upon as the establishment of any government, or as a mere pure, unauthorized, unqualified *insurrection* against the authority of the existing government of the State.

I say, therefore, that, upon that ground, these facts are not facts which this court can inquire into, or which the court below could try; because they are facts going to prove (if they prove any thing) the establishment of a new sovereignty; and that is a question to be settled elsewhere and otherwise. From the very nature of the case, it is not a question to be decided by judicial inquiry. Take, for example, one of the points which it involves. My adversary offered to prove that the constitution was adopted by a majority of the people of Rhode Island; by a large majority, as he alleges. What does this offer call on your honors to do? Why, to ascertain, by proof, what is the number of citizens of Rhode Island, and how many attended the meetings at which the delegates to the convention were elected; and then you have to add them all up, and prove by testimony the qualifications of every one of them to be an elector. It is enough to state such a proposition to show its absurdity. As none such ever was sustained in a court of law, so none can be or ought to be sustained. Ob-

serve that minutes of proceedings can be no proof, for they were made by no authentic persons; registers were kept by no warranted officers; chairmen and moderators were chosen without authority. In short, there are no official records; there is no testimony in the case but parol. Chief Justice Durfee has stated this so plainly, that I need not dwell upon it.

But, again, I say you cannot look into the facts attempted to be proved, because of the certainty of the continuance of the old government till the new and legal constitution went into effect on the 3d of May, 1843. To prove that there was another constitution of two days' duration would be ridiculous. And I say that the decision of Rhode Island herself, by her legislature, by her executive, by the adjudication of her highest court of law, on the trial of Dorr, has shut up the whole case. Do you propose, (I will not put it in that form,) but would it be proper for this court to reverse that adjudication? That declares that the judges of Rhode Island know nothing of the "People's Constitution." Is it possible, then, for this court, or for the court below, to know any thing of it?

It appears to me that, if there were nothing else in the case, the proceedings of Rhode Island herself must close every body's mouth, in the court and out of it. Rhode Island is competent to decide the question herself, and every body else ought to be bound by her decision. And she has decided it.

And it is but a branch of this to say, according to my second proposition, —

2. That if every thing offered had been proved, if in the nature of the case these facts and proceedings could have been received as proof, the court could not have listened to them, because every one of them is regarded by the State in which they took place as a *criminal* act. Who can derive any authority from acts declared to be criminal? The very proceedings which are now set up here show that this pretended constitution was founded upon acts which the legislature of the State had provided punishment for, and which the courts of the State have punished. All, therefore, which the plaintiff has attempted to prove, are acts which he was not allowed to prove, because they were criminal in themselves, and have been so treated and punished, so far as the State government, in its discretion, has thought proper to punish them.

3. Thirdly, and lastly, I say that there is no evidence offered,

nor has any distinct allegation been made, that there was an actual government established and put in operation to displace the Charter government, even for a single day. That is evident enough. You find the whole embraced in those two days, the 3d and 4th of May. The French revolution was thought to be somewhat rapid. That took *three* days. But this work was accomplished in two. It is all there, and what is it? Its birth, its whole life, and its death were accomplished in forty-eight hours. What does it appear that the members of this government did? Why, they voted that A should be treasurer, and C, secretary, and Mr. Dorr, governor; and chose officers of the Supreme Court. But did ever any man under that authority attempt to exercise a particle of official power? Did any man ever bring a suit? Did ever an officer make an arrest? Did any act proceed from any member of this government, or from any agent of it, to touch a citizen of Rhode Island in his person, his safety, or his property, so as to make the party answerable upon an indictment or in a civil suit? Never. It never performed one single act of government. It never did a thing in the world! All was patriotism, and all was paper; and with patriotism and with paper it went out on the 4th of May, admitting itself to be, as all must regard it, a contemptible *sham!*

I have now done with the principles involved in this case, and the questions presented on this record.

In regard to the other case, I have but few words to say. And, first, I think it is to be regretted that the court below sent up such a list of points on which it was divided. I shall not go through them, and shall leave it to the court to say whether, after they shall have disposed of the first cause, there is any thing left. I shall only draw attention to the subject of martial law; and in respect to that, instead of going back to martial law as it existed in England at the time the charter of Rhode Island was granted, I shall merely observe that martial law confers power of arrest, of summary trial, and prompt execution; and that when it has been proclaimed, the land becomes a camp, and the law of the camp is the law of the land. Mr. Justice Story defines martial law to be the law of war, a resort to military authority in cases where the civil law is not sufficient; and it confers summary power, not to be used arbitrarily or for the gratification of personal feelings of hatred or revenge, but for the preservation of order and of the public

peace. The officer clothed with it is to judge of the degree of force that the necessity of the case may demand; and there is no limit to this, except such as is to be found in the nature and character of the exigency.

I now take leave of this whole case. That it is an interesting incident in the history of our institutions, I freely admit. That it has come hither is a subject of no regret to me. I might have said, that I see nothing to complain of in the proceedings of what is called the Charter government of Rhode Island, except that it might perhaps have discreetly taken measures at an earlier period for revising the constitution. If in that delay it erred, it was the error into which prudent and cautious men would fall. As to the enormity of freehold suffrage, how long is it since Virginia, the parent of States, gave up her freehold suffrage? How long is it since nobody voted for governor in New York without a freehold qualification? There are now States in which no man can vote for members of the upper branch of the legislature who does not own fifty acres of land. Every State requires more or less of a property qualification in its officers and electors; and it is for discreet legislation, or constitutional provisions, to determine what its amount shall be. Even the Dorr constitution had a property qualification. According to its provisions, for officers of the State, to be sure, any body could vote; but its authors remembered that taxation and representation go together, and therefore they declared that no man, in any town, should vote to lay a tax for town purposes who had not the means to pay his portion. It said to him, You cannot vote in the town of Providence to levy a tax for repairing the streets of Providence; but you may vote for governor, and for thirteen representatives from the town of Providence, and send them to the legislature, and there they may tax the people of Rhode Island at their sovereign will and pleasure.

I believe that no harm can come of the Rhode Island agitation in 1841, but rather good. It will purify the political atmosphere from some of its noxious mists, and I hope it will clear men's minds from unfounded notions and dangerous delusions. I hope it will bring them to look at the regularity, the order, with which we carry on what, if the word were not so much abused, I would call our *glorious* representative system of popular gov-

ernment. Its principles will stand the test of this crisis, as they have stood the test and torture of others. They are exposed always, and they always will be exposed, to dangers. There are dangers from the extremes of too much and of too little popular liberty; from monarchy, or military despotism, on one side, and from licentiousness and anarchy on the other. This always will be the case. The classical navigator had been told that he must pass a narrow and dangerous strait:

> "Dextrum Scylla latus, lævum implacata Charybdis,
> Obsidet."

Forewarned, he was alive to his danger, and knew, by signs not doubtful, where he was, when he approached its scene:

> "Et gemitum ingentem pelagi, pulsataque saxa,
> Audimus longe, fractasque ad litora voces;
> Exsultantque vada, atque æstu miscentur arenæ.
> . . . Nimirum hæc illa Charybdis!"

The long-seeing sagacity of our fathers enables us to know equally well where we are, when we hear the voices of tumultuary assemblies, and see the turbulence created by numbers meeting and acting without the restraints of law; and has most wisely provided constitutional means of escape and security. When the established authority of government is openly contemned; when no deference is paid to the regular and authentic declarations of the public will; when assembled masses put themselves above the law, and, calling themselves the people, attempt by force to seize on the government; when the social and political order of the state is thus threatened with overthrow, and the spray of the waves of violent popular commotion lashes the stars, our political pilots may well cry out:

> "Nimirum hæc illa Charybdis!"

The prudence of the country, the sober wisdom of the people, has thus far enabled us to carry this Constitution, and all our constitutions, through the perils which have surrounded them, without running upon the rocks on one side, or being swallowed up in the eddying whirlpools of the other. And I fervently hope that this signal happiness and good fortune will continue, and that our children after us will exercise a similar prudence, and wisdom, and justice; and that, under the Divine blessing, our system of free government may continue to go on, with equal prosperity, to the end of time.

Diplomatic and Official Papers

Introductory Note[1]

THE greater part of the contents of this division of the work is derived from the separate volume, which appeared in 1848, under the title of the "Diplomatic and Official Papers" of Mr. Webster. Such official letters as have been published since Mr. Webster returned to the Department of State in 1850 have been added in this collection. Among these is the letter to the Chevalier Hülsemann, of the 21st of December, 1850.

The volume published in 1848 contained, besides the letters of Mr. Webster, numerous letters from the American Minister in London, from the Commissioners of Massachusetts and Maine relative to the northeastern boundary, from the British Minister, and from General Cass. Of these such only have been retained in the present work as seemed necessary to the full understanding of Mr. Webster's letters, and the subjects treated in them

[1] To the Edition of 1851.

The Case of Alexander McLeod*

Mr. Fox to Mr. Webster.

Washington, March 12, 1841.

THE undersigned, her Britannic Majesty's Envoy Extraordinary and Minister Plenipotentiary, is instructed by his government to make the following official communication to the government of the United States.

Her Majesty's government have had under their consideration the correspondence which took place in Washington in December last, between the United States Secretary of State, Mr. Forsyth, and the undersigned, comprising two official letters from Mr. Forsyth to the undersigned, dated the 26th and 30th of the same month, upon the subject of the arrest and imprisonment of Mr. Alexander McLeod, of Upper Canada, by the authorities of the State of New York, upon a pretended charge of arson and murder, as having been engaged in the capture and destruction of the steamboat "Caroline," on the 29th of December, 1837.

The undersigned is directed, in the first place, to make known to the government of the United States that her Majesty's government entirely approve of the course pursued by the undersigned in that correspondence, and of the language adopted by him in the official letters above mentioned.

And the undersigned is now instructed again to demand from the government of the United States, formally, in the name of the British government, the immediate release of Mr. Alexander McLeod.

* The history of this case will be found in the ninth volume of this collection, in Mr. Webster's speech of the 6th and 7th of April, 1846, in vindication of the treaty of Washington.

The grounds upon which the British government make this demand upon the government of the United States are these: that the transaction on account of which Mr. McLeod has been arrested, and is to be put upon his trial, was a transaction of a public character, planned and executed by persons duly empowered by her Majesty's colonial authorities to take any steps and to do any acts which might be necessary for the defence of her Majesty's territories and for the protection of her Majesty's subjects; and that, consequently, those subjects of her Majesty who engaged in that transaction were performing an act of public duty, for which they cannot be made personally and individually answerable to the laws and tribunals of any foreign country.

The transaction in question may have been, as her Majesty's government are of opinion that it was, a justifiable employment of force for the purpose of defending the British territory from the unprovoked attack of a band of British rebels and American pirates, who, having been permitted to arm and organize themselves within the territory of the United States, had actually invaded and occupied a portion of the territory of her Majesty; or it may have been, as alleged by Mr. Forsyth, in his note to the undersigned of the 26th of December, "a most unjustifiable invasion, in time of peace, of the territory of the United States." But this is a question especially of a political and international kind, which can be discussed and settled only between the two governments, and which the courts of justice of the State of New York cannot by possibility have any means of judging or any right of deciding.

It would be contrary to the universal practice of civilized nations to fix individual responsibility upon persons who, with the sanction or by the orders of the constituted authorities of a State, engaged in military or naval enterprises in their country's cause; and it is obvious that the introduction of such a principle would aggravate beyond measure the miseries, and would frightfully increase the demoralizing effects of war, by mixing up with national exasperation the ferocity of personal passions, and the cruelty and bitterness of individual revenge.

Her Majesty's government cannot believe that the government of the United States can really intend to set an example so fraught with evil to the community of nations, and the direct

tendency of which must be to bring back into the practice of modern war atrocities which civilization and Christianity have long since banished.

Neither can her Majesty's government admit for a moment the validity of the doctrine advanced by Mr. Forsyth, that the Federal government of the United States has no power to interfere in the matter in question, and that the decision thereof must rest solely and entirely with the State of New York.

With the particulars of the internal compact which may exist between the several States that compose this Union, foreign powers have nothing to do; the relations of foreign powers are with the aggregate Union; that Union is to them represented by the Federal government; and of that Union the Federal government is to them the only organ. Therefore, when a foreign power has redress to demand for a wrong done to it by any State of the Union, it is to the Federal government, and not to the separate State, that such power must look for redress for that wrong. And such foreign power cannot admit the plea that the separate State is an independent body, over which the Federal government has no control. It is obvious that such a doctrine, if admitted, would at once go to a dissolution of the Union as far as its relations with foreign powers are concerned; and that foreign powers in such case, instead of accrediting diplomatic agents to the Federal government, would send such agents, not to that government, but to the government of each separate State, and would make their relations of peace and war with each State depend upon the result of their separate intercourse with such State, without reference to the relations they might have with the rest.

Her Majesty's government apprehend that the above is not the conclusion at which the government of the United States intend to arrive; yet such is the conclusion to which the arguments that have been advanced by Mr. Forsyth necessarily lead.

But be that as it may, her Majesty's government formally demand, upon the grounds already stated, the immediate release of Mr. McLeod; and her Majesty's government entreat the President of the United States to take into his most deliberate consideration the serious nature of the consequences which must ensue from a rejection of this demand.

The United States government will perceive that, in demanding Mr. McLeod's release, her Majesty's government argue upon the assumption that he was one of the persons engaged in the capture of the steamboat "Caroline"; but her Majesty's government have the strongest reasons for being convinced that Mr. McLeod was not, in fact, engaged in that transaction; and the undersigned is hereupon instructed to say, that, although the circumstance itself makes no difference in the political and international question at issue, and although her Majesty's government do not demand Mr. McLeod's release upon the ground that he was not concerned in the capture of the "Caroline," but upon the ground that the capture of the "Caroline" was a transaction of a public character, for which the persons engaged in it cannot incur private and personal responsibility; yet the government of the United States must not disguise from themselves that the fact that Mr. McLeod was not engaged in the transaction must necessarily tend greatly to inflame that national resentment which any harm that shall be suffered by Mr. McLeod at the hands of the authorities of the State of New York will infallibly excite throughout the whole of the British empire.

The undersigned, in addressing the present official communication, by order of his government, to Mr. Webster, Secretary of State of the United States, has the honor to offer him the assurance of his distinguished consideration.

H. S. Fox.

The Hon. Daniel Webster, *Secretary of State.*

Mr. Webster to Mr. Fox.

Department of State, Washington, April 24, 1841.

The undersigned, Secretary of State of the United States, has the honor to inform Mr. Fox, Envoy Extraordinary and Minister Plenipotentiary of her Britannic Majesty, that his note of the 12th of March was received and laid before the President.

Circumstances well known to Mr. Fox have necessarily delayed for some days the consideration of that note.

The undersigned has the honor now to say, that it has been fully considered, and that he has been directed by the President to address to Mr. Fox the following reply.

Mr. Fox informs the government of the United States, that

he is instructed to make known to it that the government of her Majesty entirely approve the course pursued by him in his correspondence with Mr. Forsyth in December last, and the language adopted by him on that occasion; and that that government have instructed him "again to demand from the government of the United States, formally, in the name of the British government, the immediate release of Mr. Alexander McLeod"; that "the grounds upon which the British government make this demand upon the government of the United States are these: that the transaction on account of which Mr. McLeod has been arrested, and is to be put upon his trial, was a transaction of a public character, planned and executed by persons duly empowered by her Majesty's colonial authorities to take any steps and to do any acts which might be necessary for the defence of her Majesty's territories, and for the protection of her Majesty's subjects; and that, consequently, those subjects of her Majesty who engaged in that transaction were performing an act of public duty, for which they cannot be made personally and individually answerable to the laws and tribunals of any foreign country."

The President is not certain that he understands precisely the meaning intended by her Majesty's government to be conveyed by the foregoing instruction.

This doubt has occasioned with the President some hesitation; but he inclines to take it for granted that the main purpose of the instruction was, to cause it to be signified to the government of the United States that the attack on the steamboat "Caroline" was an act of public force, done by the British colonial authorities, and fully recognized by the Queen's government at home; and that, consequently, no individual concerned in that transaction can, according to the just principles of the laws of nations, be held personally answerable in the ordinary courts of law, as for a private offence; and that upon this avowal of her Majesty's government, Alexander McLeod, now imprisoned on an indictment for murder alleged to have been committed in that attack, ought to be released by such proceedings as are usual and are suitable to the case.

The President adopts the conclusion, that nothing more than this could have been intended to be expressed, from the consideration that her Majesty's government must be fully aware that

in the United States, as in England, persons confined under judicial process can be released from that confinement only by judicial process. In neither country, as the undersigned supposes, can the arm of the executive power interfere, directly or forcibly, to release or deliver the prisoner. His discharge must be sought in a manner conformable to the principles of law, and the proceedings of courts of judicature. If an indictment, like that which has been found against Alexander McLeod, and under circumstances like those which belong to his case, were pending against an individual in one of the courts of England, there is no doubt that the law officer of the crown might enter a *nolle prosequi;* or that the prisoner might cause himself to be brought up on *habeas corpus*, and discharged, if his ground of discharge should be adjudged sufficient; or that he might prove the same facts and insist on the same defence or exemption on his trial.

All these are legal modes of proceeding, well known to the laws and practice of both countries. But the undersigned does not suppose that, if such a case were to arise in England, the power of the executive government could be exerted in any more direct manner. Even in the case of ambassadors, and other public ministers whose right of exemption from arrest is personal, requiring no fact to be ascertained but the mere fact of diplomatic character, and to arrest whom is sometimes made a highly penal offence, if the arrest be actually made, it can only be discharged by application to the courts of law.

It is understood that Alexander McLeod is holden as well on civil as on criminal process, for acts alleged to have been done by him in the attack on the "Caroline"; and his defence, or ground of acquittal, must be the same in both cases. And this strongly illustrates, as the undersigned conceives, the propriety of the foregoing observations; since it is quite clear that the executive government cannot interfere to arrest a civil suit between private parties in any stage of its progress; but that such suit must go on to its regular judicial termination. If, therefore, any course different from such as have been now mentioned was in contemplation of her Majesty's government, something would seem to have been expected from the government of the United States as little conformable to the laws and usages of the English government as to those of the United States, and to which this government cannot accede.

The government of the United States, therefore, acting upon the presumption, which it readily adopted, that nothing extraordinary or unusual was expected or requested of it, decided, on the reception of Mr. Fox's note, to take such measures as the occasion and its own duty appeared to require.

In his note to Mr. Fox of the 26th of December last, Mr. Forsyth, the Secretary of State of the United States, observes, that, "if the destruction of the 'Caroline' was a public act of persons in her Majesty's service, obeying the order of their superior authorities, this fact has not been before communicated to the government of the United States by a person authorized to make the admission; and it will be for the court which has taken cognizance of the offence with which Mr. McLeod is charged to decide upon its validity when legally established before it." And he adds: "The President deems this to be a proper occasion to remind the government of her Britannic Majesty, that the case of the 'Caroline' has been long since brought to the attention of her Majesty's principal Secretary of State for Foreign Affairs, who up to this day has not communicated its decision thereupon. It is hoped that the government of her Majesty will perceive the importance of no longer leaving the government of the United States uninformed of its views and intentions upon a subject which has naturally produced much exasperation, and which has led to such grave consequences."

The communication of the fact, that the destruction of the "Caroline" was an act of public force by the British authorities, being formally made to the government of the United States by Mr. Fox's note, the case assumes a decided aspect.

The government of the United States entertains no doubt, that, after this avowal of the transaction as a public transaction, authorized and undertaken by the British authorities, individuals concerned in it ought not, by the principles of public law and the general usage of civilized states, to be holden personally responsible in the ordinary tribunals of law for their participation in it. And the President presumes that it can hardly be necessary to say that the American people, not distrustful of their ability to redress public wrongs by public means, cannot desire the punishment of individuals when the act complained of is declared to have been an act of the government itself.

Soon after the date of Mr. Fox's note, an instruction was given to the Attorney-General of the United States from this department, by direction of the President, which fully sets forth the opinions of this government on the subject of McLeod's imprisonment, a copy of which instruction the undersigned has the honor herewith to inclose.

The indictment against McLeod is pending in a State court; but his rights, whatever they may be, are no less safe, it is to be presumed, than if he were holden to answer in one of the courts of this government.

He demands immunity from personal responsibility by virtue of the law of nations, and that law in civilized states is to be respected in all courts. None is either so high or so low as to escape from its authority in cases to which its rules and principles apply.

This department has been regularly informed by his Excellency, the Governor of the State of New York, that the Chief Justice of that State was assigned to preside at the hearing and trial of McLeod's case, but that, owing to some error or mistake in the process of summoning the jury, the hearing was necessarily deferred. The President regrets this occurrence, as he has a desire for a speedy disposition of the subject. The counsel for McLeod have requested authentic evidence of the avowal by the British government of the attack on and the destruction of the "Caroline," as acts done under its authority, and such evidence will be furnished to them by this department.

It is understood that the indictment has been removed into the Supreme Court of the State by the proper proceeding for that purpose, and that it is now competent for McLeod, by the ordinary process of *habeas corpus*, to bring his case for hearing before that tribunal.

The undersigned hardly needs to assure Mr. Fox, that a tribunal so eminently distinguished for ability and learning as the Supreme Court of the State of New York may be safely relied upon for the just and impartial administration of the law in this as well as in other cases; and the undersigned repeats the expression of the desire of this government, that no delay may be suffered to take place in these proceedings which can be avoided. Of this desire Mr. Fox will see evidence in the instructions above referred to.

The undersigned has now to signify to Mr. Fox, that the government of the United States has not changed the opinion which it has heretofore expressed to her Majesty's government of the character of the act of destroying the "Caroline."

It does not think that that transaction can be justified by any reasonable application or construction of the right of self-defence under the laws of nations. It is admitted that a just right of self-defence attaches always to nations as well as to individuals, and is equally necessary for the preservation of both. But the extent of this right is a question to be judged of by the circumstances of each particular case; and when its alleged exercise has led to the commission of hostile acts within the territory of a power at peace, nothing less than a clear and absolute necessity can afford ground of justification. Not having up to this time been made acquainted with the views and reasons at length which have led her Majesty's government to think the destruction of the "Caroline" justifiable as an act of self-defence, the undersigned, earnestly renewing the remonstrance of this government against the transaction, abstains for the present from any extended discussion of the question. But it is deemed proper, nevertheless, not to omit to take some notice of the general grounds of justification stated by her Majesty's government in their instruction to Mr. Fox.

Her Majesty's government have instructed Mr. Fox to say, that they are of opinion that the transaction which terminated in the destruction of the "Caroline" was a justifiable employment of force for the purpose of defending the British territory from the unprovoked attack of a band of British rebels and American pirates, who, having been "permitted" to arm and organize themselves within the territory of the United States, had actually invaded a portion of the territory of her Majesty.

The President cannot suppose that her Majesty's government, by the use of these terms, meant to be understood as intimating that those acts, violating the laws of the United States and disturbing the peace of the British territories, were done under any degree of countenance from this government, or were regarded by it with indifference, or that, under the circumstances of the case, they could have been prevented by the ordinary course of proceeding. Although he regrets that, by using the term "permitted," a possible inference of that kind

might be raised; yet such an inference, the President is willing to believe, would be quite unjust to the intentions of the British government.

That on a line of frontier such as separates the United States from her Britannic Majesty's North American Provinces, a line long enough to divide the whole of Europe into halves, irregularities, violences, and conflicts should sometimes occur, equally against the will of both governments, is certainly easily to be supposed. This may be more possible, perhaps, in regard to the United States, without any reproach to their government, since their institutions entirely discourage the keeping up of large standing armies in time of peace, and their situation happily exempts them from the necessity of maintaining such expensive and dangerous establishments. All that can be expected from either government, in these cases, is good faith, a sincere desire to preserve peace and do justice, the use of all proper means of prevention, and that, if offences cannot, nevertheless, be always prevented, the offenders shall still be justly punished. In all these respects, this government acknowledges no delinquency in the performance of its duties.

Her Majesty's government are pleased, also, to speak of those American citizens who took part with persons in Canada, engaged in an insurrection against the British government, as "American pirates." The undersigned does not admit the propriety or justice of this designation. If citizens of the United States fitted out, or were engaged in fitting out, a military expedition from the United States, intended to act against the British government in Canada, they were clearly violating the laws of their own country, and exposing themselves to the just consequences which might be inflicted on them, if taken within the British dominions. But, notwithstanding this, they were certainly not pirates, nor does the undersigned think that it can advance the purpose of fair and friendly discussion, or hasten the accommodation of national difficulties, so to denominate them. Their offence, whatever it was, had no analogy to cases of piracy. Supposing all that is alleged against them to be true, they were taking a part in what they regarded as a civil war, and they were taking a part on the side of the rebels. Surely England herself has not regarded persons thus engaged as deserving the appellation which her Majesty's government bestows on these citizens of the United States.

It is quite notorious, that, for the greater part of the last two centuries, subjects of the British crown have been permitted to engage in foreign wars, both national and civil, and in the latter in every stage of their progress; and yet it has not been imagined that England has at any time allowed her subjects to turn pirates. Indeed, in our own times, not only have individual subjects of that crown gone abroad to engage in civil wars, but we have seen whole regiments openly recruited, embodied, armed, and disciplined in England, with the avowed purpose of aiding a rebellion against a nation with which England was at peace; although it is true that, subsequently, an act of Parliament was passed to prevent transactions so nearly approaching to public war, without license from the crown.

It may be said that there is a difference between the case of a civil war arising from a disputed succession, or a protracted revolt of a colony against the mother country, and the case of a fresh outbreak, or commencement of a rebellion. The undersigned does not deny that such distinction may, for certain purposes, be deemed well founded. He admits that a government, called upon to consider its own rights, interests, and duties, when civil wars break out in other countries, may decide on all the circumstances of the particular case upon its own existing stipulations, on probable results, on what its own security requires, and on many other considerations. It may be already bound to assist one party, or it may become bound, if it so chooses, to assist the other, and to meet the consequences of such assistance.

But whether the revolt be recent or long continued, they who join those concerned in it, whatever may be their offence against their own country, or however they may be treated, if taken with arms in their hands in the territory of the government against which the standard of revolt is raised, cannot be denominated pirates without departing from all ordinary use of language in the definition of offences. A cause which has so foul an origin as piracy cannot, in its progress or by its success, obtain a claim to any degree of respectability or tolerance among nations; and civil wars, therefore, are not understood to have such a commencement.

It is well known to Mr. Fox, that authorities of the highest eminence in England, living and dead, have maintained that

the general law of nations does not forbid the citizens or subjects of one government from taking part in the civil commotions of another. There is some reason, indeed, to think that such may be the opinion of her Majesty's government at the present moment.

The undersigned has made these remarks from the conviction that it is important to regard established distinctions, and to view the acts and offences of individuals in the exactly proper light. But it is not to be inferred that there is, on the part of this government, any purpose of extenuating in the slightest degree the crimes of those persons, citizens of the United States, who have joined in military expeditions against the British government in Canada. On the contrary, the President directs the undersigned to say, that it is his fixed resolution that all such disturbers of the national peace, and violators of the laws of their country, shall be brought to exemplary punishment. Nor will the fact that they are instigated and led on to these excesses by British subjects, refugees from the Provinces, be deemed any excuse or palliation; although it is well worthy of being remembered that the prime movers of these disturbances on the borders are subjects of the Queen, who come within the territories of the United States, seeking to enlist the sympathies of their citizens by all the motives which they are able to address to them on account of grievances, real or imaginary. There is no reason to believe that the design of any hostile movement from the United States against Canada has commenced with citizens of the United States. The true origin of such purposes and such enterprises is on the other side of the line. But the President's resolution to prevent these transgressions of the law is not, on that account, the less strong. It is taken, not only in conformity to his duty under the provisions of existing laws, but in full consonance with the established principles and practice of this government.

The government of the United States has not, from the first, fallen into the doubts, elsewhere entertained, of the true extent of the duties of neutrality. It has held, that, however it may have been in less enlightened ages, the just interpretation of the modern law of nations is, that neutral states are bound to be strictly neutral; and that it is a manifest and gross impropriety for individuals to engage in the civil conflicts of other

states, and thus to be at war while their government is at peace. War and peace are high national relations, which can properly be established or changed only by nations themselves.

The United States have thought, also, that the salutary doctrine of non-intervention by one nation in the affairs of others is liable to be essentially impaired, if, while government refrains from interference, interference is still allowed to its subjects, individually or in masses. It may happen, indeed, that persons choose to leave their country, emigrate to other regions, and settle themselves on uncultivated lands, in territories belonging to other states. This cannot be prevented by governments which allow the emigration of their subjects and citizens; and such persons, having voluntarily abandoned their own country, have no longer claim to its protection, nor is it longer responsible for their acts. Such cases, therefore, if they occur, show no abandonment of the duty of neutrality.

The government of the United States has not considered it as sufficient to confine the duties of neutrality and non-interference to the case of governments whose territories lie adjacent to each other. The application of the principle may be more necessary in such cases, but the principle itself they regard as being the same, if those territories be divided by half the globe. The rule is founded in the impropriety and danger of allowing individuals to make war on their own authority, or, by mingling themselves in the belligerent operations of other nations, to run the hazard of counteracting the policy, or embroiling the relations, of their own government. And the United States have been the first among civilized states to enforce the observance of this just rule of neutrality and peace, by special and adequate legal enactments. In the infancy of this government, on the breaking out of the European wars which had their origin in the French Revolution, Congress passed laws, with severe penalties, for preventing the citizens of the United States from taking part in those hostilities.

By these laws, it prescribed to the citizens of the United States what it understood to be their duty as neutrals, by the law of nations, and the duty, also, which they owed to the interest and honor of their own country.

At a subsequent period, when the American colonies of a European power took up arms against their sovereign, Con-

gress, not diverted from the established system of the government by any temporary considerations, not swerved from its sense of justice and of duty by any sympathies which it might naturally feel for one of the parties, did not hesitate also to pass acts applicable to the case of colonial insurrection and civil war. And these provisions of law have been continued, revised, amended, and are in full force at the present moment. Nor have they been a dead letter, as it is well known that exemplary punishments have been inflicted on those who have transgressed them. It is known, indeed, that heavy penalties have fallen on individuals (citizens of the United States) engaged in this very disturbance in Canada with which the destruction of the "Caroline" was connected. And it is in Mr. Fox's knowledge, also, that the act of Congress of the 10th of March, 1838, was passed for the precise purpose of more effectually restraining military enterprises from the United States into the British Provinces, by authorizing the use of the most sure and decisive preventive means. The undersigned may add, that it stands on the admission of very high British authority, that during the recent Canadian troubles, although bodies of adventurers appeared on the border, making it necessary for the people of Canada to keep themselves in a state prepared for self-defence, yet that these adventurers were acting by no means in accordance with the feeling of the great mass of the American people, or of the government of the United States.

This government, therefore, not only holds itself above reproach in every thing respecting the preservation of neutrality, the observance of the principle of non-intervention, and the strictest conformity, in these respects, to the rules of international law, but it doubts not that the world will do it the justice to acknowledge that it has set an example not unfit to be followed by others; and that, by its steady legislation on this most important subject, it has done something to promote peace and good neighborhood among nations, and to advance the civilization of mankind.

The undersigned trusts that, when her Britannic Majesty's government shall present the grounds at length on which they justify the local authorities of Canada in attacking and destroying the "Caroline," they will consider that the laws of the United States are such as the undersigned has now represented them,

and that the government of the United States has always manifested a sincere disposition to see those laws effectually and impartially administered. If there have been cases in which individuals, justly obnoxious to punishment, have escaped, this is no more than happens in regard to other laws.

Under these circumstances, and under those immediately connected with the transaction itself, it will be for her Majesty's government to show upon what state of facts and what rules of national law the destruction of the "Caroline" is to be defended. It will be for that government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the "Caroline" was impracticable, or would have been unavailing. It must be shown that daylight could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others, and then drawing her into the current above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror. A necessity for all this the government of the United States cannot believe to have existed.

All will see that, if such things be allowed to occur, they must lead to bloody and exasperated war. And when an individual comes into the United States from Canada, and to the very place on which this drama was performed, and there chooses to make public and vainglorious boast of the part he acted in it, it is hardly wonderful that great excitement should be created, and some degree of commotion arise.

This republic does not wish to disturb the tranquillity of the

world. Its object is peace, its policy peace. It seeks no aggrandizement by foreign conquest, because it knows that no foreign acquisitions could augment its power and importance so rapidly as they are already advancing by its own natural growth, under the propitious circumstances of its situation. But it cannot admit that its government has not both the will and the power to preserve its own neutrality, and to enforce the observance of its own laws upon its own citizens. It is jealous of its rights, and among others, and most especially, of the right of the absolute immunity of its territory against aggression from abroad; and these rights it is the duty and determination of this government fully and at all times to maintain, while it will at the same time as scrupulously refrain from infringing on the rights of others.

The President instructs the undersigned to say, in conclusion, that he confidently trusts that this and all other questions of difference between the two governments will be treated by both in the full exercise of such a spirit of candor, justice, and mutual respect as shall give assurance of the long continuance of peace between the two countries.

The undersigned avails himself of this opportunity to assure Mr. Fox of his high consideration.

DANIEL WEBSTER.

HENRY S. FOX, ESQ., *Envoy Extraordinary and Minister Plenipotentiary.*

[INCLOSURE.]

Mr. Webster to the Attorney-General of the United States.

Department of State, Washington, March 15, 1841.

SIR, — Alexander McLeod, a Canadian subject of her Britannic Majesty, is now imprisoned at Lockport, in the State of New York, under an indictment for murder alleged to have been committed by him in the attack on, and the destruction of, the steamboat "Caroline," at Schlosser, in that State, on the night of the 29th of December, 1837; and his trial is expected to take place at Lockport on the 22d instant.

You are apprised of the correspondence which took place between Mr. Forsyth, late Secretary of State, and Mr. Fox, her Britannic Majesty's minister here, on this subject, in December last. In his note to Mr. Fox, of the 26th of that month, Mr. Forsyth says: —

"If the destruction of the 'Caroline' was a public act of persons in her Majesty's service, obeying the order of their superior authorities, this fact has not been before communicated to the government of the United States by a person authorized to make the admission; and it will be for the court which has taken cognizance of the offence with which Mr. McLeod is charged to decide upon its validity when legally established before it.

"The President deems this to be a proper occasion to remind the government of her Britannic Majesty that the case of the 'Caroline' has been long since brought to the attention of her Majesty's principal Secretary of State for Foreign Affairs, who, up to this day, has not communicated its decision thereupon. It is hoped that the government of her Majesty will perceive the importance of no longer leaving the government of the United States uninformed of its views and intentions upon a subject which has naturally produced much exasperation, and which has led to such grave consequences."

I have now to inform you that Mr. Fox has addressed a note to this department, under date of the 12th instant, in which, by the immediate instruction and direction of his government, he demands, formally and officially, McLeod's immediate release, on the ground that this transaction, on account of which he has been arrested and is to be put upon his trial, was of a public character, planned and executed by persons duly empowered by her Majesty's colonial authorities to take any steps, and to do any acts, which might be necessary for the defence of her Majesty's territories, and for the protection of her Majesty's subjects; and that, consequently, those subjects of her Majesty who engaged in that transaction were performing an act of public duty, for which they cannot be made, personally and individually, answerable to the laws and tribunals of any foreign country; and that her Majesty's government has further directed Mr. Fox to make known to the government of the United States that her Majesty's government entirely approved of the course pursued by Mr. Fox, and the language adopted by him in the correspondence above mentioned.

There is, therefore, now an authentic declaration on the part of the British government that the attack on the "Caroline" was an act of public force, done by military men under the orders

of their superiors, and is recognized as such by the Queen's government. The importance of this declaration is not to be doubted, and the President is of opinion that it calls upon him for the performance of a high duty. That an individual, forming part of a public force, and acting under the authority of his government, is not to be held answerable as a private trespasser or malefactor, is a principle of public law sanctioned by the usages of all civilized nations, and which the government of the United States has no inclination to dispute. This has no connection whatever with the question, whether, in this case, the attack on the "Caroline" was, as the British government think it, a justifiable employment of force for the purpose of defending the British territory from unprovoked attack, or whether it was a most unjustifiable invasion, in time of peace, of the territory of the United States, as this government has regarded it. The two questions are essentially distinct and different; and, while acknowledging that an individual may claim immunity from the consequences of acts done by him, by showing that he acted under national authority, this government is not to be understood as changing the opinions which it has heretofore expressed in regard to the real nature of the transaction which resulted in the destruction of the "Caroline." That subject it is not necessary for any purpose connected with this communication now to discuss. The views of this government in relation to it are known to that of England; and we are expecting the answer of that government to the communication which has been made to it.

All that is intended to be said at present is, that, since the attack on the "Caroline" is avowed as a national act, which may justify reprisals, or even general war, if the government of the United States, in the judgment which it shall form of the transaction and of its own duty, should see fit so to decide, yet that it raises a question entirely public and political, a question between independent nations; and that individuals concerned in it cannot be arrested and tried before the ordinary tribunals, as for the violation of municipal law. If the attack on the "Caroline" was unjustifiable, as this government has asserted, the law which has been violated is the law of nations; and the redress which is to be sought is the redress authorized, in such cases, by the provisions of that code.

You are well aware that the President has no power to arrest the proceeding in the civil and criminal courts of the State of New York. If this indictment were pending in one of the courts of the United States, I am directed to say that the President, upon the receipt of Mr. Fox's last communication, would have immediately directed a *nolle prosequi* to be entered.

Whether, in this case, the Governor of New York have that power, or, if he have, whether he would feel it his duty to exercise it, are points upon which we are not informed.

It is understood that McLeod is holden also on a civil process, sued out against him by the owner of the "Caroline." We suppose it very clear that the executive of the State cannot interfere with such process; and, indeed, if such process were pending in the courts of the United States, the President could not arrest it. In such and many analogous cases, the party prosecuted or sued must avail himself of his exemption or defence by judicial proceedings, either in the court into which he is called, or in some other court. But whether the process be criminal or civil, the fact of having acted under public authority, and in obedience to the orders of lawful superiors, must be regarded as a valid defence; otherwise individuals would be holden responsible for injuries resulting from the acts of government, and even from the operations of public war.

You will be furnished with a copy of this instruction, for the use of the executive of New York and the Attorney-General of that State. You will carry with you, also, authentic evidence of the recognition by the British government of the destruction of the Caroline as an act of public force, done by national authority.

The President is impressed with the propriety of transferring the trial from the scene of the principal excitement to some other and distant county. You will take care that this be suggested to the prisoner's counsel. The President is gratified to learn that the Governor of New York has already directed that the trial take place before the Chief Justice of the State.

Having consulted with the Governor, you will proceed to Lockport, or wherever else the trial may be holden, and furnish the prisoner's counsel with the evidence of which you will be in possession material to his defence. You will see that he have skilful and eminent counsel, if such be not already retained;

and although you are not desired to act as counsel yourself, you will cause it to be signified to him, and to the gentleman who may conduct his defence, that it is the wish of this government that, in case his defence be overruled by the court in which he shall be tried, proper steps be taken immediately for removing the cause, by writ of error, to the Supreme Court of the United States.

The President hopes that you will use such despatch as to make your arrival at the place of trial sure before the trial comes on; and he trusts you will keep him informed of whatever occurs by means of a correspondence through this department.

I have the honor to be, Mr. Attorney-General, your obedient servant.

DANIEL WEBSTER.

HON. JOHN J. CRITTENDEN, *Attorney-General of the United States.*

It is known that McLeod was brought before the Supreme Court of the State of New York by writ of *habeas corpus*, and his discharge from imprisonment insisted on, upon the ground that, if he had had any concern in the destruction of the "Caroline," he had acted therein as a soldier, under the order of his superiors, in a military expedition planned and authorized by the British colonial government of Canada, and afterward avowed and sanctioned by the Queen's government in England.

The court on that occasion, however, took a different view of the law from that which had been expressed by Mr. Webster in his letters to Mr. Fox and Mr. Crittenden. The case is reported in Wendell's Reports, Vol. XXV., page 483.

This decision does not appear to have given satisfaction either to the profession or to the public men of the country. It was ably reviewed in a pamphlet by the late D. B. Talmadge, formerly one of the judges of the Superior Court of the City of New York. That Review will also be found in Wendell's Reports, Vol. XXVI., in the Appendix.

Chancellor Kent, Chief Justice Spencer, and other eminent jurists, have expressed their approbation of Mr. Talmadge's "Review," and their entire concurrence in his judgment upon the legal question.

It was justly apprehended, that, if the tribunals of individual States possessed the power of acting on questions of this kind, without revision or control, dangerous consequences might arise to the peace of the country. How could the government of the United States be responsible for the fulfilment of its obligations to other governments, their citizens and subjects, if, in cases of so much importance and delicacy as

McLeod's, a State court might take final judgment into its own hands? An ultimate reference, in some way, to the judicial authorities of the United States, of questions connected with the foreign relations of the country, and which may involve its peace, would seem to be quite essential. Under the influence of such a conviction, and with this decision of the Supreme Court of New York before it, Congress, on the 29th of August, 1842, passed the following act: —

"*An Act to provide further remedial Justice in the Courts of the United States.*

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That either of the justices of the Supreme Court of the United States, or judge of any District Court of the United States in which a prisoner is confined, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases of any prisoner or prisoners in jail or confinement, where he, she, or they, being subjects or citizens of a foreign state, and domiciled therein, shall be committed or confined, or in custody, under or by any authority or law, or process founded thereon, of the United States, or of any one of them, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, or order, or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof. And upon the return of the said writ, and due proof of the service of notice of the said proceeding to the Attorney-General, or other officer prosecuting the pleas of the State under whose authority the petitioner has been arrested, committed, or is held in custody, to be prescribed by the said justice or judge at the time of granting said writ, the said justice or judge shall proceed to hear the said cause; and if, upon hearing the same, it shall appear that the prisoner or prisoners is or are entitled to be discharged from such confinement, commitment, custody, or arrest, for or by reason of such alleged right, title, authority, privileges, protection, or exemption so set up and claimed, and the law of nations applicable thereto, and that the same exists in fact, and has been duly proved to the said justice or judge, then it shall be the duty of the said justice or judge forthwith to discharge

such prisoner or prisoners accordingly. And if it shall appear to the said justice or judge that such judgment or discharge ought not to be rendered, then the said prisoner or prisoners shall be forthwith remanded: *Provided always*, That from any decision of such justice or judge an appeal may be taken to the Circuit Court of the United States for the district in which the said cause is heard; and from the judgment of the said Circuit Court to the Supreme Court of the United States, on such terms and under such regulations and orders, as well for the custody and appearance of the prisoner or prisoners as for sending up to the appellate tribunal a transcript of the petition, writ of *habeas corpus* returned thereto, and other proceedings, as the judge hearing the said cause may prescribe; and pending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against said prisoner or prisoners in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of *habeas corpus*, shall be deemed null and void."

The authorities of public law would appear to be under no doubt of McLeod's right to be exempted from personal responsibility for any act he might have committed as a member of a military force acting under the authority of its government.

The following citations may be sufficient to establish this, and to maintain the principles stated in Mr. Webster's letter to the Attorney-General.

"On all occasions susceptible of doubt, the whole nation, the individuals, and especially the military, are to submit their judgment to those who hold the reins of government, to the sovereign. This they are bound to do, by the essential principles of political society and of government. What would be the consequence if, at every step of the sovereign, the subjects were at liberty to weigh the justice of his reasons, and refuse to march to a war which might to them appear unjust? It often happens that prudence will not permit a sovereign to disclose all his reasons. It is the duty of subjects to suppose them just and wise, until clear and absolute evidence tells them the contrary. When, therefore, under the impression of such an idea, they have lent their assistance in a war which is afterward found to be unjust, the sovereign alone is guilty; he alone is bound to repair the injuries. The subjects, and

in particular the military, are innocent; they have acted only from a necessary obedience." *

"Indeed, in solemn war, the individual members of a nation which has declared war are not punishable by the adverse nation for what they do, because the guilt of their actions is chargeable upon the nation which directs and authorizes them to act. But even this effect may be produced, though not in the respect of all the members of the nation, yet in respect of some of them, without a declaration of war. For, in the less solemn kinds of war, what the members do who act under the particular direction and authority of their nation is by the law of nations no personal crime in them; they cannot, therefore, be punished, consistently with this law, for any act in which it considers them only as the instruments, and the nation as the agent." †

"A mere presumption of the will of the sovereign would not be sufficient to excuse a governor or any other officer who should undertake a war, except in case of necessity, without either a general or particular order. For it is not sufficient to know what part the sovereign would probably act, if he were consulted in such a particular posture of affairs; but it should rather be considered, in general, what it is probable a prince would desire should be done, without consulting him, when the matter will bear no delay and the affair is dubious. Now, certainly, sovereigns will never consent that their ministers should, whenever they think proper, undertake without their order a thing of such importance as an offensive war, which is the proper subject of the present inquiry.

"In these circumstances, whatever part the sovereign would have thought proper to act if he had been consulted, and whatever success the war undertaken without his order may have had, it is left to the sovereign whether he will ratify or condemn the act of his ministers. If he ratify it, this approbation renders the war solemn, by reflecting back, as it were, an authority upon it; so that it obliges the whole commonwealth." ‡

* Vattel, Book III. Ch. II. § 187.
† Rutherford, Book II. Ch. IX. § 18.
‡ Burlamaqui, Part IV Ch. III. §§ 18, 19.

Treaty of Washington of 1842

THE NORTHEASTERN BOUNDARY.

A LEADING object sought to be accomplished, and which was accomplished, by the treaty of Washington, was the settlement of the controversy between the United States and England relative to the northern and northeastern boundary of the United States.

The history of this controversy, from the treaty of peace in 1783, to its final adjustment in 1842, is given in Mr. Webster's speech in the Senate, of the 6th and 7th of April, 1846.* In the summer of 1841, Mr. Webster signified to Mr. Fox, the British Minister at Washington, that, having received the President's authority for so doing, he was then willing to make an attempt to settle the boundary dispute, by agreeing on a conventional line, or line by compromise. In September of that year the ministry of Sir Robert Peel came into power; and in December following, Lord Aberdeen, Secretary of State for Foreign Affairs, informed Mr. Edward Everett, at that time Minister of the United States at the Court of London, that the Queen's government had determined to send Lord Ashburton as a special minister to the United States, with full powers to settle the boundary and all other questions in controversy between the two governments. This information was immediately communicated by Mr. Everett to Mr. Webster, in a letter dated the 31st of December, 1841, to which Mr. Webster replied as follows: —

Mr. Webster to Mr. Everett.

[EXTRACT.]

Department of State, Washington, January 29, 1842.

By the "Britannia," arrived at Boston, I have received your despatch of the 28th of December (No. 4), and your other de-

* Vol. IX. p. 78.

spatch of the 31st of the same month (No. 5), with a postscript of the 3d of January.

The necessity of returning an early answer to these communications (as the "Britannia" is expected to leave Boston on the 1st of February) obliges me to postpone a reply to those parts of them which are not of considerable and immediate importance.

. . . . .

The President has read Lord Aberdeen's note to you of the 20th of December, in reply to Mr. Stevenson's note to Lord Palmerston of the 21st of October, and thinks you were quite right in acknowledging the dispassionate tone of that paper. It is only by the exercise of calm reason, that truth can be arrived at in questions of a complicated nature; and between states, each of which understands and respects the intelligence and the power of the other, there ought to be no unwillingness to follow its guidance. At the present day, no state is so high as that the principles of its intercourse with other nations are above question, or its conduct above scrutiny. On the contrary, the whole civilized world, now vastly better informed on such subjects than in former ages, and alive and sensible to the principles adopted, and the purposes avowed, by the leading states, necessarily constitutes a tribunal august in character and formidable in its decisions. And it is before this tribunal, and upon the rules of natural justice, moral propriety, the usages of modern times, and the prescriptions of public law, that governments, which respect themselves and respect their neighbors, must be prepared to discuss with candor and with dignity any topics which may have caused differences to spring up between them.

Your despatch of the 31st of December announces the important intelligence of an intention of despatching a special minister from England to the United States, with full powers to settle every matter in dispute between the two governments, and the President directs me to say, that he regards this proceeding as originating in an entirely amicable spirit, and that it will be met, on his part, with perfectly corresponding sentiments. The high character of Lord Ashburton is well known to this government; and it is not doubted that he will enter on the duties assigned to him, not only with the advantages

of much knowledge and experience in public affairs, but with a true desire to signalize his mission by assisting to place the peace of the two countries on a permanent basis. He will be received with the respect due to his own character, the character of the government which sends him, and the high importance to both countries of the subjects intrusted to his negotiation.

The President approves your conduct in not pursuing in England the discussion of questions which are now to become the subjects of negotiation here.

DANIEL WEBSTER.

Lord Ashburton arrived in Washington on the 4th of April, 1842; and shortly after, Mr. Webster addressed the following letter to the Governor of the State of Maine: —

Mr. Webster to Governor Fairfield.

Department of State, Washington, April 11, 1842.

Your Excellency is aware that, previous to March, 1841, a negotiation had been going on for some time between the Secretary of State of the United States, under the direction of the President, and the British minister accredited to this government, having for its object the creation of a joint commission for settling the controversy respecting the northeastern boundary of the United States, with a provision for an ultimate reference to arbitrators, to be appointed by some one of the sovereigns of Europe, in case an arbitration should become necessary. On the leading features of a convention for this purpose the two governments had become agreed; but on several matters of detail the parties differed, and appear to have been interchanging their respective views and opinions, projects and counter-projects, without coming to any final arrangement, down to August, 1840. Various causes, not now necessary to be explained, arrested the progress of the negotiation at that time, and no considerable advance has since been made in it.

It seems to have been understood on both sides, that, one arbitration having failed, it was the duty of the two parties to proceed to institute another, according to the spirit of the treaty of Ghent and other treaties; and the President has felt

it to be his duty, unless some new course should be proposed, to cause the negotiation to be resumed, and pressed to its conclusion. But I have now to inform your Excellency that Lord Ashburton, a minister plenipotentiary and special, has arrived at the seat of the government of the United States, charged with full powers from his sovereign to negotiate and settle the different matters in discussion between the two governments. I have further to state to you, that he has officially announced to this department, that, in regard to the boundary question, he has authority to treat for a conventional line, or line by agreement, on such terms and conditions, and with such mutual considerations and equivalents, as may be thought just and equitable, and that he is ready to enter upon a negotiation for such conventional line so soon as this government shall say it is authorized and ready, on its part, to commence such negotiation.

Under these circumstances, the President has felt it to be his duty to call the serious attention of the governments of Maine and Massachusetts to the subject, and to submit to those governments the propriety of their coöperation, to a certain extent, and in a certain form, in an endeavor to terminate a controversy already of so long duration, and which seems very likely to be still considerably further protracted before the desired end of a final adjustment shall be attained, unless a shorter course of arriving at that end be adopted than such as has heretofore been pursued, and as the two governments are still pursuing.

Yet, without the concurrence of the two States whose rights are more immediately concerned, both having an interest in the soil, and one of them in the jurisdiction and government, the duty of this government will be to adopt no new course, but, in compliance with treaty stipulations, and in furtherance of what has already been done, to hasten the pending negotiations as fast as possible, in the course hitherto adopted.

But the President thinks it a highly desirable object to prevent the delays necessarily incident to any settlement of the question by these means. Such delays are great and unavoidable. It has been found that an exploration and examination of the several lines constitute a work of three years. The existing commission for making such exploration, under the au-

thority of the United States, has been occupied two summers, and a very considerable portion of the work remains still to be done. If a joint commission should be appointed, and should go through the same work, and the commissioners should disagree, as is very possible, and an arbitration on that account become indispensable, the arbitrators might find it necessary to make an exploration and survey themselves, or cause the same to be done by others, of their own appointment. If to these causes, operating to postpone the final decision, be added the time necessary to appoint arbitrators, and for their preparation to leave Europe for the service, and the various retarding incidents always attending such operations, seven or eight years constitute, perhaps, the shortest period within which we can look for a final result. In the mean time, great expenses have been incurred, and further expenses cannot be avoided. It is well known that the controversy has brought heavy charges upon Maine herself, to the remuneration or proper settlement of which she cannot be expected to be indifferent. The exploration by the government of the United States has already cost a hundred thousand dollars, and the charge of another summer's work is in prospect. These facts may be sufficient to enable us to form a probable estimate of the whole expense likely to be incurred before the controversy can be settled by arbitration; and our experience admonishes us that even another arbitration might possibly fail.

The opinion of this government upon the justice and validity of the American claim has been expressed at so many times, and in so many forms, that a repetition of that opinion is not necessary. But the subject is a subject in dispute. The government has agreed to make it matter of reference and arbitration; and it must fulfil that agreement, unless another mode for settling the controversy should be resorted to, with the hope of producing a speedier decision. The President proposes, then, that the governments of Maine and Massachusetts should severally appoint a commissioner or commissioners, empowered to confer with the authorities of this government upon a conventional line, or line by agreement, with its terms, conditions, considerations, and equivalents; with an understanding, that no such line will be agreed upon without the assent of such commissioners.

This mode of proceeding, or some other which shall express assent beforehand, seems indispensable, if any negotiation for a conventional line is to be attempted; since, if happily a treaty should be the result of the negotiation, it can only be submitted to the Senate of the United States for ratification.

It is a subject of deep and sincere regret to the President, that the British plenipotentiary did not arrive in the country and make known his powers in time to have made this communication before the annual session of the legislatures of the two States had been brought to a close. He perceives and laments the inconvenience which may be experienced from reassembling those legislatures. But the British mission is a special one; it does not supersede the resident mission of the British government at Washington, and its stay in the United States is not expected to be long. In addition to these considerations, it is to be suggested that more than four months of the session of Congress have already passed, and it is highly desirable, if any treaty for a conventional line should be agreed on, that it should be concluded before the session shall terminate, not only because of the necessity of the ratification of the Senate, but also because it is not impossible that measures may be thought advisable, or become important, which can only be accomplished by the authority of both houses.

These considerations, in addition to the importance of the subject, and a firm conviction in the mind of the President that the interests of both countries, as well as the interests of the two States more immediately concerned, require a prompt effort to bring this dispute to an end, constrain him to express an earnest hope that your Excellency will convene the legislature of Maine, and submit the subject to its grave and candid deliberations.

I am, &c.

DANIEL WEBSTER.

HIS EXCELLENCY JOHN FAIRFIELD, *Governor of Maine.*

In pursuance of this invitation and a similar one addressed to the Governor of Massachusetts, commissioners on the part of those two States repaired to Washington, where they arrived in the early part of June.

After some preliminary correspondence, the following letter was addressed by Mr. Webster to the Maine commissioners:—

Mr. Webster to the Maine Commissioners.

Department of State, Washington, July 15, 1842.

GENTLEMEN, — You have had an opportunity of reading Lord Ashburton's note to me of the 11th of July. Since that date I have had full and frequent conferences with him respecting the eastern boundary, and believe I understand what is practicable to be done on that subject, so far as he is concerned. In these conferences he has made no positive or binding proposition, thinking, perhaps, it would be more desirable, under present circumstances, that such proposition should proceed from the side of the United States. I have reason to believe, however, that he would agree to a line of boundary between the United States and the British Provinces of Canada and New Brunswick, such as is described in a paper accompanying this (marked B), and identified by my signature.

In establishing the line between the monument and the St. John, it is thought necessary to adhere to that run and marked by the surveyors of the two governments in 1817 and 1818. There is no doubt that the line recently run by Major Graham is more entirely accurate; but, being an *ex parte* line, there would be objections to agreeing to it without examination, and thus another survey would become necessary. Grants and settlements, also, have been made in conformity with the former line, and its errors are so inconsiderable that it is not thought that their correction is a sufficient object to disturb these settlements. Similar considerations have had great weight in adjusting the line in other parts of it.

The territory in dispute between the two countries contains twelve thousand and twenty-seven square miles, equal to seven million six hundred ninety-seven thousand two hundred eighty acres.

By the line prescribed in the accompanying paper, there will be assigned to the United States seven thousand and fifteen square miles, equal to four million four hundred eighty-nine thousand six hundred acres; and to England five thousand and twelve square miles, equal to three million two hundred seven thousand six hundred eighty acres.

By the award of the King of the Netherlands, there was assigned to the United States seven thousand nine hundred eight

square miles, or five million sixty-one thousand one hundred twenty acres; to England, four thousand one hundred nineteen square miles, or two million six hundred thirty-six thousand one hundred sixty acres.

The territory proposed to be relinquished to England south of the line of the King of the Netherlands is, as you will see, the mountain range from the upper part of the St. Francis River to the meeting of the two contested lines of boundary, at the Metjarmette Portage, in the highlands, near the source of the St. John. This mountain tract contains eight hundred ninety-three square miles, equal to five hundred seventy-one thousand five hundred twenty acres. It is supposed to be of no value for cultivation or settlement. On this point you will see herewith a letter from Captain Talcott, who has been occupied two summers in exploring the line of the highlands, and is intimately acquainted with the territory. The line leaves to the United States, between the base of the hills and the left bank of the St. John, and lying along upon the river, a territory of six hundred fifty-seven thousand two hundred eighty acres, embracing, without doubt, all the valuable land south of the St. Francis and west of the St. John. Of the general division of the territory, it is believed it may be safely said, that, while the portion remaining with the United States is, in quantity, seven twelfths, in value it is at least four fifths of the whole.

Nor is it supposed that the possession of the mountain region is of any importance in connection with the defence of the country, or any military operations. It lies below all the accustomed practicable passages for troops into and out of Lower Canada; that is to say, the Chaudière, Lake Champlain and the Richelieu, and the St. Lawrence. If an army, with its *materiel*, could possibly pass into Canada over these mountains, it would only find itself on the banks of the St. Lawrence *below* Quebec; and, on the other hand, it is not conceivable that an invading enemy from Lower Canada would attempt a passage in this direction, leaving the Chaudière on the one hand and the route by the Madawaska on the other.

If this line should be agreed to on the part of the United States, I suppose that the British minister would, as an equivalent, stipulate, first, for the use of the River St. John, for the conveyance of the timber growing on any of its branches, to

tide-water, free from all discriminating tolls, impositions, or inabilities of any kind, the timber enjoying all the privileges of British colonial timber. All opinions concur that this privilege of navigation must greatly enhance the value of the territory and the timber growing thereon, and prove exceedingly useful to the people of Maine. Second, that Rouse's Point, in Lake Champlain, and the lands heretofore supposed to be within the limits of New Hampshire, Vermont, and New York, but which a correct ascertainment of the forty-fifth parallel of latitude shows to be in Canada, should be surrendered to the United States.

It is probable, also, that the disputed line of boundary in Lake Superior might be so adjusted as to leave a disputed island within the United States.

These cessions on the part of England would enure partly to the benefit of the States of New Hampshire, Vermont, and New York, but principally to the United States. The consideration on the part of England, for making them, would be the manner agreed upon for adjusting the eastern boundary. The price of the cession, therefore, whatever it might be, would in fairness belong to the two States interested in the manner of that adjustment.

Under the influence of these considerations, I am authorized to say, that, if the commissioners of the two States assent to the line as described in the accompanying paper, the United States will undertake to pay to these States the sum of two hundred and fifty thousand dollars, to be divided between them in equal moieties; and also to undertake for the settlement and payment of the expenses incurred by those States for the maintenance of the civil *posse*, and also for a survey which it was found necessary to make.

The line suggested, with the compensations and equivalents which have been stated, is now submitted for your consideration. That it is all which might have been hoped for, looking to the strength of the American claim, can hardly be said. But, as the settlement of a controversy of such duration is a matter of high importance, as equivalents of undoubted value are offered, as longer postponement and delay would lead to further inconvenience, and to the incurring of further expenses, and as no better occasion, nor, perhaps, any other occasion, for settling

the boundary by agreement, and on the principle of equivalents, is ever likely to present itself, the government of the United States hopes that the commissioners of the two States will find it to be consistent with their duty to assent to the line proposed, and to the terms and conditions attending the proposition.

The President has felt the deepest anxiety for an amicable settlement of the question, in a manner honorable to the country, and such as should preserve the rights and interests of the States concerned. From the moment of the announcement of Lord Ashburton's mission, he has sedulously endeavored to pursue a course the most respectful toward the States, and the most useful to their interests, as well as the most becoming to the character and dignity of the government. He will be happy if the result shall be such as shall satisfy Maine and Massachusetts, as well as the rest of the country. With these sentiments on the part of the President, and with the conviction that no more advantageous arrangement can be made, the subject is now referred to the grave deliberation of the commissioners.

I have the honor to be, with great respect,

Your obedient servant,

DANIEL WEBSTER.

THE HON. THE COMMISSIONERS OF MAINE.

Lord Ashburton to Mr. Webster.

Washington, July 16, 1842.

SIR, — There is a further question of disputed boundary between Great Britain and the United States, called the northwest boundary, about which we have had some conferences; and I now proceed to state the terms which I am ready to agree to for the settlement of this difference. As the principal object in dispute is to be given up by Great Britain, I trust, Sir, that you will here again recognize the spirit of friendly conciliation which has guided my government in disposing of these questions.

I have already sufficiently discussed with you the boundaries between her Majesty's Provinces and the United States, from the monument at the head of the River St. Croix to the monument on the River St. Lawrence, near the village of St. Regis.

The commissioners under the sixth article of the treaty of Ghent succeeded in continuing this boundary from St. Regis through the St. Lawrence and the great northern lakes, up to a point in the channel between Lake Huron and Lake Superior.

A further continuation of this boundary, from this point through Lake Superior to the Lake of the Woods, was confided to the same commissioners under the seventh article of the treaty of Ghent, but they were, unfortunately, unable to agree, and have consequently left this portion of the boundary undetermined. Its final settlement has been much desired by both governments, and urgently pressed by communications from Mr. Secretary Forsyth to Mr. Fox, in 1839 and 1840.

What I have now to propose cannot, I feel assured, be otherwise than satisfactory for this purpose.

The commissioners who failed in their endeavors to make this settlement differed on two points: —

First. As to the appropriation of an island called St. George's Island, lying in the water communication between Lake Huron and Lake Superior; and,

Secondly. As to the boundary through the water communications from Lake Superior to the Lake of the Woods.

The first point I am ready to give up to you, and you are no doubt aware that it is the only object of any real value in this controversy. The island of St. George is reported to contain twenty-five thousand nine hundred and twenty acres of very fertile land; but, the other things connected with these boundaries being satisfactorily arranged, a line shall be drawn so as to throw this island within the limits of the United States.

In considering the second point, it really appears of little importance to either party how the line be determined through the wild country between Lake Superior and the Lake of the Woods, but it is important that some line should be fixed and known.

The American commissioner asked for the line from Lake Superior up the River Kamanastiguia to the lake called Dog Lake, which he supposed to be the same as that called Long Lake in the treaties, thence through Sturgeon Lake to the Lac la Pluie, to that point where the two lines assumed by the commissioners again meet.

The British commissioner, on the other hand, contended for a line from the southwestern extremity, at a point called Le Fond du Lac, to the middle of the mouth of the estuary, or lake, of St. Louis River, thence up that river through Vermilion River to Lac la Pluie.

Attempts were made to compromise these differences, but they failed, apparently more from neither party being willing to give up the island of St. George, than from much importance being attached to any other part of the case.

Upon the line from Lake Superior to the Lake of the Woods, both commissioners agreed to abandon their respective claims, and to adopt a middle course, for which the American commissioner admitted that there was some ground of preference. This was from Pigeon River, a point between Kamanastiguia and Le Fond du Lac; and although there were differences as to the precise point near the mouth of Pigeon River where the line should begin, neither party seemed to have attached much importance to this part of the subject.

I would propose that the line be taken from a point about six miles south of Pigeon River, where the Grand Portage commences on the lake, and continued along the line of said portage, alternately by land and water, to Lac la Pluie, the existing route by land and by water remaining common to both parties. This line has the advantage of being known, and attended with no doubt or uncertainty in running it.

In making the important concession on this boundary of the island of St. George, I must attach a condition to it of accommodation, which experience has proved to be necessary in the navigation of the great waters which bound the two countries; an accommodation which can, I apprehend, be no possible inconvenience to either. This was asked by the British commissioner in the course of the attempts of compromise above alluded to; but nothing was done, because he was not then prepared, as I am now, to yield the property and sovereignty of St. George's Island.

The first of these two cases is at the head of Lake St. Clair, where the river of that name empties into it from Lake Huron. It is represented that the channel bordering the United States coast in this part is not only the best for navigation, but, with some winds, is the only serviceable passage. I do not know

that, under such circumstances, the passage of a British vessel would be refused; but, on a final settlement of boundaries, it is desirable to stipulate for what the commissioners would probably have settled, had the facts been known to them.

The other case, of nearly the same description, occurs on the St. Lawrence, some miles above the boundary at St. Regis. In distributing the islands of the river by the commissioners, Barnhart's Island and the Long Sault Islands were assigned to America. This part of the river has very formidable rapids, and the only safe passage is on the southern or American side, between those islands and the mainland. We want a clause in our present treaty to say that, for a short distance, namely, from the upper end of Upper Long Sault Island to the lower end of Barnhart's Island, the several channels of the river shall be used in common by the boatmen of the two countries.

I am not aware that these very reasonable demands are likely to meet with any objection, especially where the United States will have surrendered to them all that is essential in the boundary I have now to propose to you.

I beg you will be assured, Sir, of my unfeigned and distinguished consideration.

ASHBURTON.

HON. DANIEL WEBSTER, &c., &c., &c.

Mr. Webster to Lord Ashburton.

Department of State, Washington, July 27, 1842.

MY LORD,—I have now to propose to your Lordship a line of division embracing the disputed portions of the boundary between the United States and the British Provinces of New Brunswick and the Canadas, with its considerations and equivalents, such as conforms, I believe, in substance, to the result of the many conferences and discussions which have taken place between us.

The acknowledged territories of the United States and England join upon each other from the Atlantic Ocean to the eastern foot of the Rocky Mountains, a distance of more than three thousand miles. From the ocean to the source of the St. Croix the line of division has been ascertained and fixed by agreement; from the source of the St. Croix to a point near St. Regis, on the River St. Lawrence, it may be considered as un-

settled or controverted; from this last-mentioned point, along the St. Lawrence and through the lakes, it is settled, until it reaches the water communication between Lake Huron and Lake Superior. At this point the commissioners, under the seventh article of the treaty of Ghent, found a subject of disagreement which they could not overcome, in deciding up which branch or channel the line should proceed, till it should reach a point in the middle of St. Mary's River, about one mile above St. George's or Sugar Island.

From the middle of the water communication between the two lakes, at the point last mentioned, the commissioners extended the line through the remaining part of that water communication, and across Lake Superior, to a point north of Ile Royale; but they could not agree in what direction the line should run from this last-mentioned point, nor where it should leave Lake Superior, nor how it should be extended to the Rainy Lake, or Lac la Pluie. From this last-mentioned lake they agreed on the line to the northwesternmost point of the Lake of the Woods, which they found to be in latitude forty-nine degrees twenty-three minutes fifty-five seconds. The line extends, according to existing treaties, due south from this point to the forty-ninth parallel of north latitude, and by that parallel to the Rocky Mountains.

Not being able to agree upon the whole line, the commissioners, under the seventh article, did not make any joint report to their respective governments. So far as they agreed on any part of the line, that part has been considered settled; but it may be well to give validity to these portions of the line by a treaty.

To complete the boundary line, therefore, and to remove all doubts and disputes, it is necessary for the two governments to come to an agreement on three points:—

1st. What shall be the line on the northeastern and northern limits of the United States, from the St. Croix to the St. Lawrence? This is by far the most important and difficult of the subjects, and involves the principal questions of equivalents and compensations.

2d. What shall be the course of the boundary from the point where the commissioners, under the sixth article of the treaty of Ghent, terminated their labors, to wit, a point in the Neebish

Channel, near Muddy Lake, in the water communication between Lake Huron and Lake Superior, to a point in the middle of St. Mary's River, one mile above Sugar Island? This question is important, as it involves the ownership of that island.

3d. What shall be the line from the point north of Ile Royale, in Lake Superior, to which the commissioners of the two governments arrived by agreement, to the Rainy Lake? And also to confirm those parts of the line to which the said commissioners agreed.

Besides agreeing upon the line of division through which these controverted portions of the boundary pass, you have suggested also, as the proposed settlement proceeds upon the ground of compromise and equivalents, that boats belonging to her Majesty's subjects may pass the falls of the Long Sault, in the St. Lawrence, on either side of the Long Sault Islands, and that the passages between the islands lying at or near the junction of the River St. Clair with the lake of that name shall be severally free and open to the vessels of both countries. There appears no reasonable objection to what is requested in these particulars; and on the part of the United States it is desirable that their vessels, in proceeding from Lake Erie into the Detroit River, should have the privilege of passing between Bois Blanc, an island belonging to England, and the Canadian shore, the deeper and better channel being on that side.

The line, then, now proposed to be agreed to may be thus described:—

Beginning at the monument at the source of the River St. Croix, as designated and agreed to by the commissioners under the fifth article of the treaty of 1794, between the governments of the United States and Great Britain; thence north, following the exploring line run and marked by the surveyors of the two governments in the years 1817 and 1818, under the fifth article of the treaty of Ghent, to its intersection with the River St. John, and to the middle of the channel thereof; thence up the middle of the main channel of the said River St. John to the mouth of the River St. Francis; thence up the middle of the channel of the said River St. Francis, and of the lakes through which it flows, to the outlet of the Lake Pohenagamook; thence southwesterly, in a straight line, to a point on the northwest branch of the River St. John, which point shall be ten miles dis-

tant from the main branch of the St. John, in a straight line, and in the nearest direction; but if the said point shall be found to be less than seven miles from the nearest point of the summit or crest of the highlands that divide those rivers which empty themselves into the River St. Lawrence from those which fall into the River St. John, then the said point shall be made to recede down the said river to a point seven miles, in a straight line, from the said summit or crest; thence, in a straight line, in a course about south eight degrees west, to the point where the parallel of latitude of forty-six degrees twenty-five minutes north intersects the southwest branch of the St. John; thence southerly, by the said branch, to the source thereof in the highlands at the Metjarmette Portage; thence down along the said highlands which divide the waters which empty themselves into the River St. Lawrence from those which fall into the Atlantic Ocean, to the head of Hall's Stream; thence down the middle of said stream, till the line thus run intersects the old line of boundary surveyed and marked by Valentine and Collins, previously to the year 1774, as the forty-fifth degree of north latitude, and which has been known and understood to be the line of actual division between the States of New York and Vermont on one side, and the British Province of Canada on the other; and from said point of intersection, west, along the said dividing line, as heretofore known and understood, to the Iroquois or St. Lawrence River; and from the place where the joint commissioners terminated their labors under the sixth article of the treaty of Ghent, to wit, at a point in the Neebish Channel, near Muddy Lake, the line shall run into and along the ship-channel between St. Joseph's and St. Tammany Islands, to the division of the channel at or near the head of St. Joseph's island; thence, turning eastwardly and northwardly, around the lower end of St. George's or Sugar Island, and following the middle of the channel which divides St. George's from St. Joseph's Island; thence up the east Neebish Channel nearest to St. George's Island, through the middle of Lake George; thence west of Jonas Island, into St. Mary's River, to a point in the middle of that river about one mile above St. George's or Sugar Island, so as to appropriate and assign the said island to the United States; thence, adopting the line traced on the maps by the commissioners, through the River St. Mary and

Lake Superior, to a point north of Ile Royale, in said lake, one hundred yards to the north and east of Ile Chapeau, which last-mentioned island lies near the northeastern point of Ile Royale, where the line marked by the commissioners terminates; and from the last-mentioned point, southwesterly, through the middle of the sound, between Ile Royale and the northwestern mainland, to the mouth of Pigeon River, and up the said river to and through the North and South Fowl Lakes, to the lakes of the height of land between Lake Superior and the Lake of the Woods; thence along the water communication to Lake Saisaginaga, and through that lake; thence to and through Cypress Lake, Lac du Bois Blanc, Lac la Croix, Little Vermilion Lake, and Lake Namecan, and through the several smaller lakes, straits, or streams connecting the lakes here mentioned, to that point in Lac la Pluie, or Rainy Lake, at the Chaudière Falls, from which the commissioners traced the line to the most northwestern point of the Lake of the Woods; thence along the said line, to the said most northwestern point, being in latitude forty-nine degrees twenty-three minutes fifty-five seconds north, and in longitude ninety-five degrees fourteen minutes thirty-eight seconds west from the observatory at Greenwich; thence, according to existing treaties, the line extends due south to its intersection with the forty-ninth parallel of north latitude, and along that parallel to the Rocky Mountains. It being understood that all the water communications, and all the usual portages, along the line from Lake Superior to the Lake of the Woods, and also Grand Portage from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the subjects and citizens of both countries.

It is desirable to follow the description and the exact line of the original treaty as far as practicable. There is reason to think that "Long Lake," mentioned in the treaty of 1783, meant merely the estuary of the Pigeon River, as no lake called "Long Lake," or any other water strictly conforming to the idea of a lake, is found in that quarter. This opinion is strengthened by the fact, that the words of the treaty would seem to imply that the water intended as "Long Lake" was immediately joining Lake Superior. In one respect, an exact compliance with the words of the treaty is not practicable.

There is no continuous water communication between Lake Superior and the Lake of the Woods, as the Lake of the Woods is known to discharge its waters, through the Red River of the North, into Hudson's Bay. The dividing height or ridge between the eastern sources of the tributaries of the Lake of the Woods and the western sources of Pigeon River appears, by authentic maps, to be distant about forty miles from the mouth of Pigeon River, on the shore of Lake Superior.

It is not improbable that, in the imperfection of knowledge which then existed of those remote countries, and perhaps misled by Mitchell's map, the negotiators of the treaty of 1783 supposed the Lake of the Woods to discharge its waters into Lake Superior. The broken and difficult nature of the water communication from Lake Superior to the Lake of the Woods renders numerous portages necessary; and it is right that these water communications and these portages should make a common highway, where necessary, for the use of the subjects and citizens of both governments.

When the proposed line shall be properly described in the treaty, the grant by England of the right to use the waters of the River St. John for the purpose of transporting to the mouth of that river all the timber and agricultural products raised in Maine on the waters of the St. John or any of its tributaries, without subjection to any discriminating toll, duty, or disability, is to be inserted. Provision should also be made for quieting and confirming the titles of all persons having claims to lands on either side of the line, whether such titles be perfect or inchoate only, and to the same extent in which they would have been confirmed by their respective governments had no change taken place. What has been agreed to, also, in respect to the common use of certain passages in the rivers and lakes, as already stated, must be made matter of regular stipulation.

Your Lordship is also informed, by the correspondence which formerly took place between the two governments, that there is a fund arising from the sale of timber, concerning which fund an understanding was had some years ago. It will be expedient to provide, by the treaty, that this arrangement shall be carried into effect.

A proper article will be necessary to provide for the creation

of a commission to run and mark some parts of the line between Maine and the British Provinces.

These several objects appear to me to embrace all respecting the boundary line, and its equivalents, which the treaty needs to contain as matters of stipulation between the United States and England.

I have the honor to be, with high consideration, your Lordship's most obedient servant.

DANIEL WEBSTER.

LORD ASHBURTON, &c., &c., &c.

Lord Ashburton to Mr. Webster.

Washington, July 29, 1842.

SIR, — I have attentively considered the statements contained in the letter you did me the honor of addressing me on the 27th of this month, of the terms agreed to for the settlement of boundaries between her Majesty's Provinces and the United States, being the final result of the many conferences we have had on this subject. This settlement appears substantially correct in all its parts, and we may now proceed, without further delay, to draw up the treaty. Several of the articles for this purpose are already prepared and agreed, and our most convenient course will be to take and consider them singly. I would beg leave to recommend, that, as we have excellent charts of the country through which the boundary which failed of being settled by the commissioners under the seventh article of the treaty of Ghent is partially marked, it would be advisable to make good the delineation on those charts, which would spare to both parties the unnecessary expense of new commissioners and a new survey. In this case, the only commission required would be to run the line on the boundary of Maine.

The stipulations for the greater facility of the navigation of the River St. Lawrence, and of two passages between the Upper Lakes, appear evidently desirable for general accommodation; and I cannot refuse the reciprocal claim made by you to render common the passage from Lake Erie into the Detroit River. This must be done by declaring the several passages in those parts free to both parties.

I should remark, also, that the free use of the navigation of the Long Sault passage on the St. Lawrence must be extend-

ed to below Barnhart's Island, for the purpose of clearing those rapids.

I beg leave to repeat to you, Sir, the assurances of my most distinguished consideration.

ASHBURTON.

HON. DANIEL WEBSTER, &c., &c., &c

Lord Ashburton to Mr. Webster.

Washington, August 9, 1842.

SIR, — It appears desirable that some explanation between us should be recorded by correspondence respecting the fifth article of the treaty signed by us this day for the settlement of boundaries between Great Britain and the United States.

By that article of the treaty it is stipulated that certain payments shall be made by the government of the United States to the States of Maine and Massachusetts. It has, of course, been understood that my negotiations have been with the government of the United States, and the introduction of terms of agreement between the general government and the States would have been irregular and inadmissible, if it had not been deemed expedient to bring the whole of these transactions within the purview of the treaty. There may not be wanting analogous cases to justify this proceeding; but it seems proper that I should have confirmed by you that my government incurs no responsibility for these engagements, of the precise nature and object of which I am uninformed, nor have I considered it necessary to make inquiry concerning them.

I beg, Sir, to renew to you the assurances of my high consideration.

ASHBURTON.

HON. DANIEL WEBSTER, &c., &c., &c.

Mr. Webster to Lord Ashburton.

Department of State, Washington, August 9, 1842.

MY LORD, — I have the honor to acknowledge the receipt of your note of this day, with respect to the object and intention of the fifth article of the treaty. What you say in regard to that subject is quite correct. It purports to contain no stipulation on the part of Great Britain, nor is any respon-

sibility supposed to be incurred by it on the part of your government.

I renew, my Lord, the assurances of my distinguished consideration.

DANIEL WEBSTER.

LORD ASHBURTON, &c., &c., &c

SUPPRESSION OF THE SLAVE-TRADE.

Mr. Webster to Captains Bell and Paine.

Department of State, Washington, April 30, 1842.

GENTLEMEN, — Your experience in the service on the coast of Africa has probably enabled you to give information to the government on some points connected with the slave-trade on that coast, in respect to which it is desirable that the most accurate knowledge attainable should be possessed. These particulars are, —

1. The extent of the western coast of Africa along which the slave-trade is supposed to be carried on, with the rivers, creeks, inlets, bays, harbors, or parts of the coast to which it is understood slave-ships most frequently resort.

2. The space or belt along the shore within which cruisers may be usefully employed for the purpose of detecting vessels engaged in the traffic.

3. The general course of proceeding of a slave-ship after leaving Brazil or the West Indies on a voyage to the coast of Africa for slaves, including her manner of approach to the shore, her previous bargain or arrangement for the purchase of slaves, the time of her usual stay on or near the coast, and the means by which she has communication with persons on land.

4. The nature of the stations, or barracoons, in which slaves are collected on shore to be sold to the traders, whether usually in rivers, creeks, or inlets, or on or near the open shore.

5. The usual articles of equipment and preparation, and the manner of fitting up, by which a vessel is known to be a slaver, though not caught with slaves on board.

6. The utility of employing vessels of different nations to

cruise together, so that one or the other might have a right to visit and search every vessel which might be met with under suspicious circumstances, either as belonging to the country of the vessel visiting and searching, or to some other country which has, by treaty, conceded such right of visitation and search.

7. To what places slaves from slave-ships could be most conveniently taken.

8. Finally, what number of vessels, and of what size and description, it would be necessary to employ on the western coast of Africa, in order to put an entire end to the traffic in slaves, and for what number of years it would probably be necessary to maintain such force to accomplish that purpose.

You will please to add such observations as the state of your knowledge may allow relative to the slave-trade on the eastern coast of Africa.

I have the honor to be, &c.,

DANIEL WEBSTER.

CAPTAINS BELL AND PAINE, *United States Navy.*

A detailed answer was returned by Commanders Bell and Paine to these inquiries, and upon the information which it contained, as to the nature of the slave-trade on the coast of Africa and the best means of suppressing it, the eighth article of the treaty of Washington was drawn up.

Correspondence with Lord Ashburton

INVIOLABILITY OF NATIONAL TERRITORY.

CASE OF THE "CAROLINE."

Mr. Webster to Lord Ashburton.

Department of State, Washington, July 27, 1842.

My Lord, — In relation to the case of the "Caroline," which we have heretofore made the subject of conference, I have thought it right to place in your hands an extract of a letter from this department to Mr. Fox, of the 24th of April, 1841, and an extract from the message of the President of the United States to Congress at the commencement of its present session. These papers you have, no doubt, already seen; but they are, nevertheless, now communicated, as such communication is considered a ready mode of presenting the view which this government entertains of the destruction of that vessel.

The act of which the government of the United States complains is not to be considered as justifiable or unjustifiable, as the question of the lawfulness or unlawfulness of the employment in which the "Caroline" was engaged may be decided the one way or the other. That act is of itself a wrong, and an offence to the sovereignty and the dignity of the United States, being a violation of their soil and territory; a wrong for which, to this day, no atonement, or even apology, has been made by her Majesty's government. Your Lordship cannot but be aware that self-respect, the consciousness of independence and national equality, and a sensitiveness to whatever may touch the honor of the country, a sensitiveness which this government will ever feel and ever cultivate, make this a matter of high

importance, and I must be allowed to ask for it your Lordship's grave consideration.

I have the honor to be, my Lord, your Lordship's most obedient servant.

DANIEL WEBSTER.

LORD ASHBURTON, &c., &c., &c.

This letter was accompanied with an extract from Mr. Webster's letter to Mr. Fox of the 24th of April, 1841, containing the passage which will be found on pp. 255–262 of this volume, and commencing, "The undersigned has now to signify to Mr. Fox." It is deemed unnecessary to repeat the passage here.

Extract from the Message of the President to Congress at the Commencement of the Second Session of the 27th Congress.

I regret that it is not in my power to make known to you an equally satisfactory conclusion in the case of the "Caroline" steamer, with the circumstances connected with the destruction of which, in December, 1837, by an armed force fitted out in the Province of Upper Canada, you are already made acquainted. No such atonement as was due for the public wrong done to the United States by this invasion of her territory, so wholly irreconcilable with her rights as an independent power, has yet been made. In the view taken by this government, the inquiry whether the vessel was in the employment of those who were prosecuting an unauthorized war against that Province, or was engaged by the owner in the business of transporting passengers to and from Navy Island, in hopes of private gain, which was most probably the case, in no degree alters the real question at issue between the two governments. This government can never concede to any foreign government the power, except in a case of the most urgent and extreme necessity, of invading its territory, either to arrest the persons or destroy the property of those who may have violated the municipal laws of such foreign government, or have disregarded their obligations arising under the law of nations. The territory of the United States must be regarded as sacredly secure against all such invasions, until they shall voluntarily acknowledge inability to acquit themselves of their duties to others; and in announcing this sentiment, I do but affirm a principle which no nation on earth

would be more ready to vindicate, at all hazards, than the people and government of Great Britain. If, upon a full investigation of all the facts, it shall appear that the owner of the "Caroline" was governed by a hostile intent, or had made common cause with those who were in the occupancy of Navy Island, then, so far as he is concerned, there can be no claim to indemnity for the destruction of his boat which this government would feel itself bound to prosecute, since he would have acted not only in derogation of the rights of Great Britain, but in clear violation of the laws of the United States. But that is a question which, however settled, in no manner involves the higher consideration of the violation of territorial sovereignty and jurisdiction. To recognize it as an admissible practice, that each government, in its turn, upon any sudden and unauthorized outbreak on a frontier the extent of which renders it impossible for either to have an efficient force on every mile of it, and which outbreak, therefore, neither may be able to suppress in a day, may take vengeance into its own hands, and without even a remonstrance, and in the absence of any pressing or overruling necessity, may invade the territory of the other, would inevitably lead to results equally to be deplored by both. When border collisions come to receive the sanction, or to be made on the authority, of either government, general war must be the inevitable result. While it is the ardent desire of the United States to cultivate the relations of peace with all nations, and to fulfil all the duties of good neighborhood toward those who possess territories adjoining their own, that very desire would lead them to deny the right of any foreign power to invade their boundary with an armed force. The correspondence between the two governments on this subject will, at a future day of your session, be submitted to your consideration; and in the mean time I cannot but indulge the hope, that the British government will see the propriety of renouncing, as a rule of future action, the precedent which has been set in the affair at Schlosser.

Lord Ashburton to Mr. Webster.

Washington, July 28, 1842.

Sir, — In the course of our conferences on the several subjects of difference which it was the object of my mission to en-

deavor to settle, the unfortunate case of the "Caroline," with its attendant consequences, could not escape our attention; for although it is not of a description to be susceptible of any settlement by a convention or treaty, yet, being connected with the highest considerations of national honor and dignity, it has given rise at times to deep excitements, so as more than once to endanger the maintenance of peace.

The note you did me the honor of addressing me on the 27th instant reminds me that, however disposed your government might be to be satisfied with the explanations which it has been my duty to offer, the natural anxiety of the public mind requires that these explanations should be more durably recorded in our correspondence; and you send me a copy of your note to Mr. Fox, her Britannic Majesty's minister here, and an extract from the speech of the President of the United States to Congress at the opening of the present session, as a ready mode of presenting the view entertained on this subject by the government of the United States.

It is so far satisfactory to perceive that we are perfectly agreed as to the general principles of international law applicable to this unfortunate case. Respect for the inviolable character of the territory of independent nations is the most essential foundation of civilization. It is useless to strengthen a principle so generally acknowledged by any appeal to authorities on international law, and you may be assured, Sir, that her Majesty's government set the highest possible value on this principle, and are sensible of their duty to support it by their conduct and example, for the maintenance of peace and order in the world. If a sense of moral responsibility were not a sufficient security for their observance of this duty toward all nations, it will be readily believed that the most common dictates of interest and policy would lead to it in the case of a long conterminous boundary of some thousand miles, with a country of such great and growing power as the United States of America, inhabited by a kindred race, gifted with all its activity, and all its susceptibility on points of national honor.

Every consideration, therefore, leads us to set as highly as your government can possibly do this paramount obligation of reciprocal respect for the independent territory of each. But however strong this duty may be, it is admitted by all writers,

by all jurists, by the occasional practice of all nations, not excepting your own, that a strong, overpowering necessity may arise when this great principle may and must be suspended. It must be so for the shortest possible period, during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity. Self-defence is the first law of our nature, and it must be recognized by every code which professes to regulate the condition and relations of man. Upon this modification, if I may so call it, of the great general principle, we seem also to be agreed; and on this part of the subject I have done little more than repeat the sentiments, though in less forcible language, admitted and maintained by you in the letter to which you refer me.

Agreeing, therefore, on the general principle, and on the possible exception to which it is liable, the only question between us is, whether this occurrence came within the limits fairly to be assigned to such exception; whether, to use your words, there was "that necessity of self-defence, instant, overwhelming, leaving no choice of means," which preceded the destruction of the "Caroline" while moored to the shore of the United States. Give me leave to say, Sir, with all possible admiration of your very ingenious discussion of the general principles which are supposed to govern the right and practice of interference by the people of one country in the wars and quarrels of others, that this part of your argument is little applicable to our immediate case. If Great Britain, America, or any other country, suffer their people to fit out expeditions to take part in distant quarrels, such conduct may, according to the circumstances of each case, be justly matter of complaint; and perhaps these transactions have generally been in late times too much overlooked or connived at. But the case we are considering is of a wholly different description, and may be best determined by answering the following question: Supposing a man standing on ground where you have no legal right to follow him has a weapon long enough to reach you, and is striking you down and endangering your life; how long are you bound to wait for the assistance of the authority having the legal power to relieve you? Or, to bring the facts more immediately home to the case, if cannon are moving and setting up in a battery which can reach you, and are actually destroying

life and property by their fire, if you have remonstrated for some time without effect, and see no prospect of relief, when begins your right to defend yourself, should you have no other means of doing so than by seizing your assailant on the verge of a neutral territory?

I am unwilling to recall to your recollection the particulars of this case, but I am obliged very shortly to do so, to show what was, at the time, the extent of the existing justification; for upon this entirely depends the question whether a gross insult has or has not been offered to the government and people of the United States.

After some tumultuous proceedings in Upper Canada, which were of short duration, and were suppressed by the militia of the country, the persons criminally concerned in them took refuge in the neighboring State of New York, and, with a very large addition to their numbers openly collected, invaded the Canadian territory, taking possession of Navy Island.

This invasion took place on the 16th of December, 1837; a gradual accession of numbers and of military ammunition continued openly, and, though under the sanction of no public authority, at least with no public hinderance, until the 29th of the same month, when several hundred men were collected, and twelve pieces of ordnance, which could only have been procured from some public store or arsenal, were actually mounted on Navy Island, and were used to fire within easy range upon the unoffending inhabitants of the opposite shore. Remonstrances, wholly ineffectual, were made; so ineffectual, indeed, that a militia regiment, stationed on the neighboring American island, looked on without any attempt at interference, while shots were fired from the American island itself. This important fact stands on the best American authority, being stated in a letter to Mr. Forsyth, of the 6th of February, 1838, of Mr. Benton, attorney of the United States, the gentleman sent by your government to inquire into the facts of the case, who adds, very properly, that he makes the statement "with deep regret and mortification."

This force, formed of all the reckless and mischievous people of the border, formidable from their numbers and from their armament, had in their pay, and as part of their establishment, this steamboat "Caroline," the important means and instrument

by which numbers and arms were hourly increasing. I might safely put it to any candid man acquainted with the existing state of things, to say whether the military commander in Canada had the remotest reason, on the 29th of December, to expect to be relieved from this state of suffering by the protective intervention of any American authority. How long could a government having the paramount duty of protecting its own people be reasonably expected to wait for what they had then no reason to expect? What would have been the conduct of American officers? What has been their conduct under circumstances much less aggravated? I would appeal to you, Sir, to say whether the facts which you say would alone justify this act, namely, "a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation," were not applicable to this case in as high a degree as they ever were to any case of a similar description in the history of nations.

Nearly five years are now past since this occurrence; there has been time for the public to deliberate upon it calmly, and I believe I may take it to be the opinion of candid and honorable men, that the British officers who executed this transaction, and their government who approved it, intended no slight or disrespect to the sovereign authority of the United States. That they intended no such disrespect I can most solemnly affirm, and I trust it will be admitted that no inference to the contrary can fairly be drawn, even by the most susceptible on points of national honor.

Notwithstanding my wish that the explanation I had to make might not revive in any degree any feelings of irritation, I do not see how I could treat this subject without this short recital of facts, because the proof that no disrespect was intended is mainly to be looked for in the extent of the justification.

There remains only a point or two which I should wish to notice, to remove in some degree the impression which your rather highly-colored description of this transaction is calculated to make. The mode of telling a story often tends to distort facts, and in this case more than in any other it is important to arrive at plain, unvarnished truth.

It appears from every account, that the expedition was sent to

capture the "Caroline" when she was expected to be found on the British ground of Navy Island, and that it was only owing to the orders of the rebel leader being disobeyed that she was not so found. When the British officer came round the point of the island in the night, he first discovered that the vessel was moored to the other shore. He was not by this deterred from making the capture, and his conduct was approved. But you will perceive that there was here, most decidedly, the case of justification mentioned in your note, that there should be "no moment left for deliberation." I mention this circumstance to show, also, that the expedition was not planned with a premeditated purpose of attacking the enemy within the jurisdiction of the United States, but that the necessity of so doing arose from altered circumstances at the moment of execution.

I have only further to notice the highly-colored picture drawn in your note of the facts attending the execution of this service. Some importance is attached to the attack having been made in the night, and the vessel having been set on fire and floated down the falls of the river; and it is insinuated rather than asserted, that there was carelessness as to the lives of the persons on board. The account given by the distinguished officer who commanded the expedition distinctly refutes, or satisfactorily explains, these assertions. The time of night was purposely selected as most likely to insure the execution with the least loss of life; and it is expressly stated that, the strength of the current not permitting the vessel to be carried off, and it being necessary to destroy her by fire, she was drawn into the stream for the express purpose of preventing injury to persons or property of the inhabitants at Schlosser.

I would willingly have abstained from a return to the facts of this transaction, my duty being to offer those explanations and assurances which may lead to satisfy the public mind, and to the cessation of all angry feeling, but it appeared to me that some explanation of parts of the case, apparently misunderstood, might be of service for this purpose.

Although it is believed that a candid and impartial consideration of the whole history of this unfortunate event will lead to the conclusion that there were grounds of justification as strong as were ever presented in such cases, and, above all, that no slight of the authority of the United States was ever intended,

yet it must be admitted that there was, in the hurried execution of this necessary service, a violation of territory; and I am instructed to assure you that her Majesty's government consider this as a most serious fact, and that, far from thinking that an event of this kind should be lightly risked, they would unfeignedly deprecate its recurrence. Looking back to what passed at this distance of time, what is, perhaps, most to be regretted is, that some explanation and apology for this occurrence was not immediately made; this, with a frank explanation of the necessity of the case, might, and probably would, have prevented much of the exasperation, and of the subsequent complaints and recriminations to which it gave rise.

There are possible cases in the relations of nations, as of individuals, where necessity, which controls all other laws, may be pleaded; but it is neither easy nor safe to attempt to define the rights or limits properly assignable to such a plea. This must always be a subject of much delicacy, and should be considered by friendly nations with great candor and forbearance. The intentions of the parties must mainly be looked to; and can it for a moment be supposed that Great Britain would intentionally and wantonly provoke a great and powerful neighbor?

Her Majesty's government earnestly desire that a reciprocal respect for the independent jurisdiction and authority of neighboring states may be considered among the first duties of all governments; and I have to repeat the assurance of regret they feel that the event of which I am treating should have disturbed the harmony they so anxiously wish to maintain with the American people and government.

Connected with these transactions there have also been circumstances, of which, I believe, it is generally admitted that Great Britain has had just ground to complain. Individuals have been made personally liable for acts done under the avowed authority of their government; and there are now many brave men exposed to personal consequences for no other cause than having served their country. That this is contrary to every principle of international law it is useless for me to insist. Indeed, it has been admitted by every authority of your government; but, owing to a conflict of laws, difficulties have intervened, much to the regret of those authorities, in giving practical effect to these principles; and for these difficulties some remedy

has been by all desired. It is no business of mine to enter upon the consideration of them, nor have I sufficient information for the purpose; but I trust you will excuse my addressing to you the inquiry, whether the government of the United States is now in a condition to secure, in effect and in practice, the principle, which has never been denied in argument, that individuals acting under legitimate authority are not personally responsible for executing the orders of their government? That the power, when it exists, will be used on every fit occasion, I am well assured; and I am bound to admit that, looking through the voluminous correspondence concerning these transactions, there appears no indisposition with any of the authorities of the Federal government, under its several administrations, to do justice in this respect in as far as their means and powers would allow.

I trust, Sir, I may now be permitted to hope that all feelings of resentment and ill-will resulting from these truly unfortunate events may be buried in oblivion, and that they may be succeeded by those of harmony and friendship, which it is certainly the interest, and, I also believe, the inclination, of all to promote.

I beg, Sir, you will be assured of my high and unfeigned consideration.

ASHBURTON.

HON. DANIEL WEBSTER, &c., &c., &c.

Mr. Webster to Lord Ashburton.

Department of State, Washington, August 6, 1842.

Your Lordship's note of the 28th of July, in answer to mine of the 27th, respecting the case of the "Caroline," has been received and laid before the President.

The President sees with pleasure that your Lordship fully admits those great principles of public law, applicable to cases of this kind, which this government has expressed; and that on your part, as on ours, respect for the inviolable character of the territory of independent states is the most essential foundation of civilization. And while it is admitted on both sides that there are exceptions to this rule, he is gratified to find that your Lordship admits that such exceptions must come within the limitations stated and the terms used in a former communication from this department to the British plenipotentiary here. Un-

doubtedly it is just, that, while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."

Understanding these principles alike, the difference between the two governments is only whether the facts in the case of the "Caroline" make out a case of such necessity for the purpose of self-defence. Seeing that the transaction is not recent, having happened in the time of one of his predecessors, seeing that your Lordship, in the name of your government, solemnly declares that no slight or disrespect was intended to the sovereign authority of the United States; seeing that it is acknowledged that, whether justifiable or not, there was yet a violation of the territory of the United States, and that you are instructed to say that your government consider that as a most serious occurrence; seeing, finally, that it is now admitted that an explanation and apology for this violation was due at the time; the President is content to receive these acknowledgments and assurances in the conciliatory spirit which marks your Lordship's letter, and will make this subject, as a complaint of violation of territory, the topic of no further discussion between the two governments.

As to that part of your Lordship's note which relates to other occurrences springing out of the case of the "Caroline," with which occurrences the name of Alexander McLeod has become connected, I have to say that the government of the United States entirely adheres to the sentiments and opinions expressed in the communications from this department to Mr. Fox. This government has admitted that, for an act committed by the command of his sovereign, *jure belli*, an individual cannot be responsible in the ordinary courts of another state. It would regard it as a high indignity if a citizen of its own, acting under its authority and by its special command, in such cases were held to answer in a municipal tribunal, and to undergo punishment, as if the behest of his government were no defence or protection to him.

But your Lordship is aware that, in regular constitutional governments, persons arrested on charges of high crimes can only be discharged by some judicial proceeding. It is so in Eng-

land; it is so in the colonies and provinces of England. The forms of judicial proceeding differ in different countries, being more rapid in some and more dilatory in others; and, it may be added, generally more dilatory, or at least more cautious, in cases affecting life, in governments of a strictly limited than in those of a more unlimited character. It was a subject of regret that the release of McLeod was so long delayed. A State court, and that not of the highest jurisdiction, decided that, on summary application, embarrassed, as it would appear, by technical difficulties, he could not be released by that court. His discharge shortly afterward by a jury, to whom he preferred to submit his case, rendered unnecessary the further prosecution of the legal question. It is for the Congress of the United States, whose attention has been called to the subject, to say what further provision ought to be made to expedite proceedings in such cases; and, in answer to your Lordship's question toward the close of your note, I have to say that the government of the United States holds itself, not only fully disposed, but fully competent, to carry into practice every principle which it avows or acknowledges, and to fulfil every duty and obligation which it owes to foreign governments, their citizens or subjects.

I have the honor to be, my Lord, with great consideration, your obedient servant.

DANIEL WEBSTER.

LORD ASHBURTON, &c., &c., &c.

MARITIME RIGHTS.

CASE OF THE "CREOLE."

Mr. Webster to Lord Ashburton.

Department of State, Washington, August 1, 1842

MY LORD, — The President has learned with much regret that you are not empowered by your government to enter into a formal stipulation for the better security of vessels of the United States when meeting with disasters in passing between the United States and the Bahama Islands, and driven by such

disasters into British ports. This is a subject which is deemed to be of great importance, and which cannot, on the present occasion, be overlooked.

Your Lordship is aware that several cases have occurred, within the last few years, which have caused much complaint. In some of these cases compensation has been made by the English government for the interference of the local authorities with American vessels having slaves on board, by which interference these slaves were set free. In other cases, such compensation has been refused. It appears to the President to be for the interest of both countries that the recurrence of similar cases in future should be prevented as far as possible.

Your Lordship has been acquainted with the case of the "Creole," a vessel carried into the port of Nassau last winter by persons who had risen upon the lawful authority of the vessel, and, in the accomplishment of their purpose, had committed murder on a person on board.

The opinions which that occurrence gave occasion for this government to express, in regard to the rights and duties of friendly and civilized maritime states placed by Providence near to each other, were well considered, and are entertained with entire confidence. The facts in the particular case of the "Creole" are controverted; positive and officious interference by the colonial authorities to set the slaves free being alleged on the one side, and denied on the other.

It is not my present purpose to discuss this difference of opinion as to the evidence in the case, as it at present exists, because, the rights of individuals having rendered necessary a more thorough and a judicial investigation of facts and circumstances attending the transaction, such investigation is understood to be now in progress, and its result, when known, will render me more able than at this moment to present to the British government a full and accurate view of the whole case. But it is my purpose and my duty to invite your Lordship's attention to the general subject, and your serious consideration of some practical means of giving security to the coasting trade of the United States against unlawful annoyance and interruption along this part of their shore. The Bahama Islands approach the coast of Florida within a few leagues, and, with the coast form a long and narrow channel, filled with innumerable

small islands and banks of sand, and the navigation is difficult and dangerous, not only on these accounts, but from the violence of the winds and the variable nature of the currents. Accidents are, of course, frequent, and necessity often compels vessels of the United States, in attempting to double Cape Florida, to seek shelter in the ports of these islands. Along this passage the Atlantic States hold intercourse with the States on the Gulf and the Mississippi, and through it the products of the valley of that river (a region of vast extent and boundless fertility) find a main outlet to the sea in their destination to the markets of the world.

No particular ground of complaint exists as to the treatment which American vessels usually receive in these ports, unless they happen to have slaves on board; but, in cases of that kind, complaints have been made, as already stated, of officious interference of the colonial authorities with the vessel, for the purpose of changing the condition in which these persons are, by the laws of their own country, and of setting them free.

In the Southern States of this Union slavery exists by the laws of the States and under the guaranty of the Constitution of the United States; and it has existed in them from a period long antecedent to the time when they ceased to be British colonies. In this state of things, it will happen that slaves will be often on board coasting vessels, as hands, as servants attending the families of their owners, or for the purpose of being carried from port to port. For the security of the rights of their citizens, when vessels having persons of this description on board are driven by stress of weather, or carried by unlawful force, into British ports, the United States propose the introduction of no new principle into the law of nations. They require only a faithful and exact observance of the injunctions of that code, as understood and practised in modern times.

Your Lordship observes that I have spoken only of American vessels driven into British ports by the disasters of the seas, or carried in by unlawful force. I confine my remarks to these cases, because they are the common cases, and because they are the cases which the law of nations most emphatically exempts from interference. The maritime law is full of instances of the application of that great and practical rule which declares that that which is the clear result of necessity ought to

draw after it no penalty and no hazard. If a ship be driven by stress of weather into a prohibited port, or into an open port with prohibited articles on board, in neither case is any forfeiture incurred. And what may be considered a still stronger case, it has been decided by eminent English authority, and that decision has received general approbation, that, if a vessel be driven by necessity into a port strictly blockaded, this necessity is a good defence, and exempts her from penalty.

A vessel on the high seas, beyond the distance of a marine league from the shore, is regarded as part of the territory of the nation to which she belongs, and subjected exclusively to the jurisdiction of that nation. If, against the will of her master or owner, she be driven or carried nearer to the land, or even into port, those who have, or who ought to have, control over her struggling all the while to keep her upon the high seas, and so within the exclusive jurisdiction of her own government, what reason or justice is there in creating a distinction between her rights and immunities in a position thus the result of absolute necessity, and the same rights and immunities before superior power had forced her out of her voluntary course?

But, my Lord, the rule of law, and the comity and practice of nations, go much further than these cases of necessity, and allow even to a merchant-vessel, coming into any open port of another country voluntarily, for the purposes of lawful trade, to bring with her and keep over her, to a very considerable extent, the jurisdiction and authority of the laws of her own country, excluding to this extent, by consequence, the jurisdiction of the local law. A ship, says the publicists, though at anchor in a foreign harbor, preserves its jurisdiction and its laws. It is natural to consider the vessels of a nation as parts of its territory, though at sea, as the state retains its jurisdiction over them; and, according to the commonly received custom, this jurisdiction is preserved over the vessels, even in parts of the sea subject to a foreign dominion.

This is the doctrine of the law of nations, clearly laid down by writers of received authority, and entirely conformable, as it is supposed, with the practice of modern nations.

If a murder be committed on board of an American vessel by one of the crew upon another or upon a passenger, or by a passenger on one of the crew or another passenger, while such ves-

sel is lying in a port within the jurisdiction of a foreign state or sovereignty, the offence is cognizable and punishable by the proper court of the United States, in the same manner as if such offence had been committed on board the vessel on the high seas. The law of England is supposed to be the same.

It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must, doubtless, be answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption be claimed for them. But, nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be water-borne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself.

If a vessel be driven by weather into the ports of another nation, it would hardly be alleged by any one, that, by the mere force of such arrival within the waters of the state, the law of that state would so attach to the vessel as to affect existing rights of property between persons on board, whether arising from contract or otherwise. The local law would not operate to make the goods of one man to become the goods of another man. Nor ought it to affect their personal obligations, or existing relations between themselves; nor was it ever supposed to have such effect, until the delicate and exciting question which has caused these interferences in the British islands arose. The local law in these cases dissolves no obligations or relation lawfully entered into or lawfully existing according to the laws of the ship's country. If it did, intercourse of civilized men between nation and nation must cease. Marriages are frequently celebrated in one country in a manner not lawful or valid in an-

other; but did any body ever doubt that marriages are valid all over the civilized world, if valid in the country in which they took place? Did any one ever imagine that local law acted upon such marriages to annihilate their obligation, if the party should visit a country in which marriages must be celebrated in another form?

It may be said, that, in such instances, personal relations are founded in contract, and therefore to be respected; but that the relation of master and slave is not founded in contract, and therefore is to be respected only by the law of the place which recognizes it. Whoever so reasons encounters the authority of the whole body of public law from Grotius down; because there are numerous instances in which the law itself presumes or implies contracts; and prominent among those instances is the very relation which we are now considering, and which relation is holden by law to draw after it mutuality of obligation.

Is not the relation between a father and his minor children acknowledged when they go abroad? And on what contract is this founded, but a contract raised by general principles of law, from the relation of the parties?

Your Lordship will please to bear in mind that the proposition which I am endeavoring to support is, that, by the comity of the law of nations and the practice of modern times, merchant-vessels entering open ports of other nations, for the purpose of trade, are presumed to be allowed to bring with them, and to retain, for their protection and government, the jurisdiction and laws of their own country. All this, I repeat, is presumed to be allowed; because the ports are open, because trade is invited, and because, under these circumstances, such permission or allowance is according to general usage. It is not denied that all this may be refused; and this suggests a distinction, the disregard of which may, perhaps, account for most of the difficulties arising in cases of this sort; that is to say, the distinction between what a state may do, if it pleases, and what it is presumed to do, or not to do, in the absence of any positive declaration of its will. A state might declare that all foreign marriages should be regarded as null and void within its territory; that a foreign father, arriving with an infant son, should no longer have authority or control over him; that, on the arrival of a foreign vessel in its ports, all shipping articles, and all indentures of

apprenticeship between her crew and her owners or masters, should cease to be binding. These, and many other things equally irrational and absurd, a sovereign state has doubtless the power to do; but they are not to be presumed. It is not to be taken for granted, *ab ante*, that it is the will of the sovereign state thus to withdraw itself from the circle of civilized nations. It will be time enough to believe this to be its intention when it formally announces that intention by appropriate enactments, edicts, or other declarations.

In regard to slavery within the British territories, there is a well-known and clear promulgation of the will of the sovereign authority; that is to say, there is a well-known rule of her law. As to England herself, that law has long existed; and recent acts of Parliament establish the same law for the colonies. The usual mode of stating the rule of English law is, that no sooner does a slave reach the shore of England than he is free. This is true; but it means no more than that, when a slave comes within the exclusive jurisdiction of England, he ceases to be a slave, because the law of England positively and notoriously prohibits and forbids the existence of such a relation between man and man. But it does not mean that English authorities, with this rule of English law in their hands, may enter where the jurisdiction of another nation is acknowledged to exist, and there destroy rights, obligations, and interests lawfully existing under the authority of such other nation. No such construction, and no such effect, can be rightfully given to the British law. It is true that it is competent to the British Parliament, by express statute provision, to declare that no foreign jurisdiction of any kind should exist in or over a vessel after its arrival voluntarily in her ports. And so she might close all her ports to the ships of all nations. A state may also declare, in the absence of treaty stipulations, that foreigners shall not sue in her courts, nor travel in her territories, nor carry away funds or goods received for debts. We need not inquire what would be the condition of a country that should establish such laws, nor in what relation they would leave her toward the states of the civilized world. Her power to make such laws is unquestionable; but, in the absence of direct and positive enactments to that effect, the presumption is that the opposites of these things exist. While her ports are open to foreign trade, it is to be pre-

sumed that she expects foreign ships to enter them, bringing with them the jurisdiction of their own government, and the protection of its laws, to the same extent that her ships and the ships of other commercial states carry with them the jurisdiction of their respective governments into the open ports of the world; just as it is presumed, while the contrary is not avowed, that strangers may travel in a civilized country in a time of peace, sue in its courts, and bring away their property.

A merchant-vessel enters the port of a friendly state, and enjoys while there the protection of her own laws, and is under the jurisdiction of her own government, not in derogation of the sovereignty of the place, but by the presumed allowance or permission of that sovereignty. This permission or allowance is founded on the comity of nations, like the other cases which have been mentioned; and this comity is part, and a most important and valuable part, of the law of nations, to which all nations are presumed to assent until they make their dissent known. In the silence of any positive rule affirming, or denying, or restraining the operation of foreign laws, their tacit adoption is presumed, to the usual extent. It is upon this ground that the courts of law expound contracts according to the law of the place in which they are made; and instances almost innumerable exist in which, by the general practice of civilized countries, the laws of one will be recognized and often executed in another. This is the comity of nations; and it is upon this, as its solid basis, that the intercourse of civilized states is maintained.

But while that which has now been said is understood to be the voluntary and adopted law of nations, in cases of the voluntary entry of merchant-vessels into the ports of other countries, it is nevertheless true that vessels in such ports only through an overruling necessity may place their claim for exemption from interference on still higher principles; that is to say, principles held in more sacred regard by the comity, the courtesy, or, indeed, the common sense of justice of all civilized states.

Even in regard to cases of necessity, however, there are things of an unfriendly and offensive character, which yet it may not be easy to say that a nation might not do. For example, a nation might declare her will to be, and make it the

law of her dominions, that foreign vessels cast away on her shores should be lost to their owners, and subject to the ancient law of wreck. Or a neutral state, while shutting her ports to the armed vessels of belligerents, as she has a right to do, might resolve on seizing and confiscating vessels of that description which should be driven to take shelter in her harbors by the violence of the storms of the ocean. But laws of this character, however within the absolute competence of governments, could only be passed, if passed at all, under willingness to meet the last responsibility to which nations are subjected.

The presumption is stronger, therefore, in regard to vessels driven into foreign ports by necessity, and seeking only temporary refuge, than in regard to those which enter them voluntarily, and for purposes of trade, that they will not be interfered with; and that, unless they commit, while in port, some act against the laws of the place, they will be permitted to receive supplies, to repair damages, and to depart unmolested.

If, therefore, vessels of the United States, pursuing lawful voyages from port to port along their own shore, are driven by stress of weather, or carried by unlawful force, into English ports, the government of the United States cannot consent that the local authorities in those ports shall take advantage of such misfortunes, and enter them for the purpose of interfering with the condition of persons or things on board, as established by their own laws. If slaves, the property of citizens of the United States, escape into the British territories, it is not expected that they will be restored. In that case, the territorial jurisdiction of England will have become exclusive over them, and must decide their condition. But slaves on board of American vessels lying in British waters are not within the exclusive jurisdiction of England, or under the exclusive operation of English law; and this founds the broad distinction between the cases. If persons guilty of crimes in the United States seek an asylum in the British dominions, they will not be demanded until provision for such cases be made by treaty; because the giving up of criminals, fugitive from justice, is agreed and understood to be a matter in which every nation regulates its conduct according to its own discretion. It is no breach of comity to refuse such surrender.

On the other hand, vessels of the United States, driven by necessity into British ports, and staying there no longer than such necessity exists, violating no law, and having no intent to violate any law, will claim, and there will be claimed for them, protection and security, freedom from molestation, and from all interference with the character or condition of persons or things on board. In the opinion of the government of the United States, such vessels, so driven and so detained by necessity in a friendly port, ought to be regarded as still pursuing their original voyage, and turned out of their direct course only by disaster, or by wrongful violence; that they ought to receive all assistance necessary to enable them to resume that direct course; and that interference and molestation by the local authorities, where the whole voyage is lawful, both in act and intent, is ground for just and grave complaint.

Your Lordship's discernment and large experience in affairs cannot fail to suggest to you how important it is to merchants and navigators engaged in the coasting trade of a country so large in extent as the United States, that they should feel secure against all but the ordinary causes of maritime loss. The possessions of the two governments closely approach each other. This proximity, which ought to make us friends and good neighbors, may, without proper care and regulation, itself prove a ceaseless cause of vexation, irritation, and disquiet.

If your Lordship has no authority to enter into a stipulation by treaty for the prevention of such occurrences hereafter as have already happened, occurrences so likely to disturb that peace between the two countries which it is the object of your Lordship's mission to establish and confirm, you may still be so far acquainted with the sentiments of your government as to be able to engage that instructions shall be given to the local authorities in the islands, which shall lead them to regulate their conduct in conformity with the rights of citizens of the United States, and the just expectations of their government, and in such manner as shall, in future, take away all reasonable ground of complaint. It would be with the most profound regret that the President should see that, while it is now hoped so many other subjects of difference may be harmoniously adjusted, nothing should be done in regard to this dangerous source of future collisions.

I avail myself of this occasion to renew to your Lordship the assurances of my distinguished consideration.

DANIEL WEBSTER.

LORD ASHBURTON, &c., &c., &c.

Lord Ashburton to Mr. Webster.

Washington, August 6, 1842.

SIR, — You may well be assured that I am duly sensible of the great importance of the subject to which you call my attention in the note which you did me the honor of addressing me the 1st instant, in which you inform me that the President had been pleased to express his regret that I was not empowered by my government to enter into a formal stipulation for the better security of vessels of the United States when meeting with disasters in passing between the United States and the Bahama Islands, and driven by such disasters into British ports.

It is, I believe, unnecessary that I should tell you that the case of the "Creole" was known in London a few days only before my departure. No complaint had at that time been made by Mr. Everett. The subject was not, therefore, among those which it was the immediate object of my mission to discuss. But at the same time I must admit that, from the moment I was acquainted with the facts of this case, I was sensible of all its importance, and I should not think myself without power to consider of some adjustment of, and remedy for, a great acknowledged difficulty, if I could see my way clearly to any satisfactory course, and if I had not arrived at the conclusion, after very anxious consideration, that, for the reasons which I will state, this question had better be treated in London, where it will have a much increased chance of settlement on terms likely to satisfy the interests of the United States.

The immediate case of the "Creole" would be easily disposed of, but it involves a class and description of cases which, for the purpose of affording that security you seek for the trade of America through the Bahama Channel, brings into consideration questions of law, both national and international, of the highest importance; and, to increase the delicacy and difficulty of the subject, public feeling is sensitively alive to every thing connected with it. These circumstances bring me to the convic-

tion, that, although I really believe that much may be done to meet the wishes of your government, the means of doing so would be best considered in London, where immediate reference may be had to the highest authorities on every point of delicacy and difficulty that may arise. Whatever I might attempt would be more or less under the disadvantage of being fettered by apprehensions of responsibility, and I might thereby be kept within limits which my government at home might disregard. In other words, I believe you would have a better chance in this settlement with them than with me. I state this after some imperfect endeavors, by correspondence, to come at satisfactory explanations. If I were in this instance treating of ordinary material interests, I should proceed with more confidence; but, anxious as I unfeignedly am that all questions likely to disturb the future understanding between us should be averted, I strongly recommend this question of the security of the Bahama Channel being referred for discussion in London.

This opinion is more decidedly confirmed by your very elaborate and important argument on the application of the general principles of the law of nations to these subjects, an argument to which your authority necessarily gives great weight, but in which I would not presume to follow you with my own imperfect means. Great Britain and the United States, covering all the seas of the world with their commerce, have the greatest possible interest in maintaining sound and pure principles of international law, as well as the practice of reciprocal aid and good offices in all their harbors and possessions. With respect to the latter, it is satisfactory to know that the disposition of the respective governments and people leaves little to be desired, with the single exception of those very delicate and perplexing questions which have recently arisen from the state of slavery, and even these seem confined, and likely to continue to be confined, to the narrow passage of the Bahama Channel. At no other part of the British possessions are American vessels with slaves ever likely to touch, nor are they likely to touch there otherwise than from the pressure of very urgent necessity. The difficulty, therefore, as well as the desired remedy, is apparently confined within narrow limits.

Upon the great general principles affecting this case we do

not differ. You admit that if slaves, the property of American citizens, escape into British territories, it is not expected that they will be restored; and you may be well assured that there is no wish on our part that they should reach our shores, or that British possessions should be used as decoys for the violators of the laws of a friendly neighbor.

When these slaves do reach us, by whatever means, there is no alternative. The present state of British law is in this respect too well known to require repetition; nor need I remind you that it is exactly the same with the laws of every part of the United States where a state of slavery is not recognized; and that the slave put on shore at Nassau would be dealt with exactly as would a foreign slave landed, under any circumstances whatever, at Boston.

But what constitutes the being within British dominion, from which these consequences are to follow? Is a vessel passing through the Bahama Channel, and forced involuntarily, either from storm or mutiny, into British waters, to be so considered? What power have the authorities of those islands to take cognizance of persons or property in such vessels? These are questions which you, Sir, have discussed at great length, and with evident ability. Although you have advanced some propositions which rather surprise and startle me, I do not pretend to judge them; but what is very clear is, that great principles are involved in a discussion which it would ill become me lightly to enter upon; and I am confirmed by this consideration in wishing that the subject be referred to where it will be perfectly weighed and examined.

It behooves the authorities of our two governments well to guard themselves against establishing by their diplomatic intercourse false precedents and principles, and that they do not, for the purpose of meeting a passing difficulty, set examples which may hereafter mislead the world.

It is not intended on this occasion to consider in detail the particular instances which have given rise to these discussions. They have already been stated and explained. Our object is rather to look to the means of future prevention of such occurrences. That this may be obtained I have little doubt, although we may not be able immediately to agree on the precise stipulations of a treaty. On the part of Great Britain, there

are certain great principles too deeply rooted in the consciences and sympathies of the people for any minister to be able to overlook; and any engagement I might make in opposition to them would be instantly disavowed; but, at the same time that we maintain our own laws within our own territories, we are bound to respect those of our neighbors, and to listen to every possible suggestion of means of averting from them every annoyance and injury. I have great confidence that this may be effectually done in the present instance; but the case to be met and remedied is new, and must not be too hastily dealt with. You may, however, be assured that measures so important for the preservation of friendly intercourse between the two countries shall not be neglected.

In the mean time, I can engage that instructions shall be given to the governors of her Majesty's colonies on the southern borders of the United States to execute their own laws with careful attention to the wish of their government to maintain good neighborhood, and that there shall be no officious interference with American vessels driven by accident or by violence into those ports. The laws and duties of hospitality shall be executed; and these seem neither to require nor to justify any further inquisition into the state of persons or things on board of vessels so situated than may be indispensable to enforce the observance of the municipal law of the colony, and the proper regulation of its harbors and waters.

A strict and careful attention to these rules, applied in good faith to all transactions as they arise, will, I hope and believe, without any abandonment of great and general principles, lead to the avoidance of any excitement or agitation on this very sensitive subject of slavery, and consequently of those irritating feelings which may have a tendency to bring into peril all the great interests connected with the maintenance of peace.

I further trust that friendly sentiments, and a conviction of the importance of cherishing them, will on all occasions lead the two countries to consider favorably any further arrangements which may be judged necessary for the reciprocal protection of their interests.

I hope, Sir, that this explanation on this very important subject will be satisfactory to the President, and that he will see in it no diminution of that earnest desire, which you have been

pleased to recognize in me, to perform my work of reconciliation and friendship; but that he will rather perceive in my suggestion, in this particular instance, that it is made with a well-founded hope of thereby better obtaining the object we have in view.

I beg to renew to you, Sir, the assurances of my high consideration.

ASHBURTON.

HON. DANIEL WEBSTER, &c., &c., &c

Mr. Webster to Lord Ashburton.

Department of State, Washington, August 8, 1842.

MY LORD, — I have the honor to acknowledge the receipt of your Lordship's note of the 6th instant, in answer to mine of the 1st, upon the subject of a stipulation for the better security of American vessels driven by accident or carried by force into the British West India ports.

The President would have been gratified if you had felt yourself at liberty to proceed at once to consider of some proper arrangement, by formal treaty, for this object; but there may be weight in the reasons which you urge for referring such mode of stipulation for consideration in London.

The President places his reliance on those principles of public law which were stated in my note to your Lordship, and which are regarded as equally well founded and important; and on your Lordship's engagement that instructions shall be given to the governors of her Majesty's colonies to execute their own laws with careful attention to the wish of their government to maintain good neighborhood, and that there shall be no officious interference with American vessels driven by accident or by violence into those ports; that the laws and duties of hospitality shall be executed, and that these seem neither to require nor to justify any further inquisition into the state of persons or things on board of vessels so situated than may be indispensable to enforce the observance of the municipal law of the colony, and the proper regulation of its harbors and waters. He indulges the hope, nevertheless, that, actuated by a just sense of what is due to the mutual interests of the two countries, and the maintenance of a permanent peace between them, her Majesty's government will not fail to see the

importance of removing, by such further stipulations, by treaty or otherwise, as may be found to be necessary, all cause of complaint connected with this subject.

I have the honor to be, with high consideration, your Lordship's obedient servant,

DANIEL WEBSTER.

LORD ASHBURTON, &c., &c., &c.

IMPRESSMENT.

Mr. Webster to Lord Ashburton.

Department of State, Washington, August 8, 1842.

MY LORD, — We have had several conversations on the subject of impressment, but I do not understand that your Lordship has instructions from your government to negotiate upon it, nor does the government of the United States see any utility in opening such negotiation, unless the British government is prepared to renounce the practice in all future wars.

No cause has produced to so great an extent, and for so long a period, disturbing and irritating influences on the political relations of the United States and England, as the impressment of seamen by British cruisers from American merchant-vessels.

From the commencement of the French Revolution to the breaking out of the war between the two countries in 1812, hardly a year elapsed without loud complaint and earnest remonstrance. A deep feeling of opposition to the right claimed, and to the practice exercised under it, and not unfrequently exercised without the least regard to what justice and humanity would have dictated, even if the right itself had been admitted, took possession of the public mind of America, and this feeling, it is well known, coöperated most powerfully with other causes to produce the state of hostilities which ensued.

At different periods, both before and since the war, negotiations have taken place between the two governments, with the hope of finding some means of quieting these complaints. At some times, the effectual abolition of the practice has been re-

quested and treated of; at other times, its temporary suspension; and at other times, again, the limitation of its exercise, and some security against its enormous abuses.

A common destiny has attended these efforts; they have all failed. The question stands at this moment where it stood fifty years ago. The nearest approach to a settlement was a convention proposed in 1803, and which had come to the point of signature, when it was broken off in consequence of the British government insisting that the *narrow seas* should be expressly excepted out of the sphere over which the contemplated stipulation against impressment should extend. The American minister, Mr. King, regarded this exception as quite inadmissible, and chose rather to abandon the negotiation than to acquiesce in the doctrine which it proposed to establish.

England asserts the right of impressing British subjects, in time of war, out of neutral merchant-vessels, and of deciding by her visiting officers who, among the crews of such merchant-vessels, are British subjects. She asserts this as a legal exercise of the prerogative of the crown; which prerogative is alleged to be founded on the English law of the perpetual and indissoluble allegiance of the subject, and his obligation under all circumstances, and for his whole life, to render military service to the crown whenever required.

This statement, made in the words of eminent British jurists, shows at once that the English claim is far broader than the basis or platform on which it is raised. The law relied on is English law; the obligations insisted on are obligations existing between the crown of England and its subjects. This law and these obligations, it is admitted, may be such as England may choose they shall be. But then they must be confined to the parties. Impressment of seamen out of and beyond English territory, and from on board the ships of other nations, is an interference with the rights of other nations; is further, therefore, than English prerogative can legally extend; and is nothing but an attempt to enforce the peculiar law of England beyond the dominions and jurisdiction of the crown. The claim asserts an extra-territorial authority for the law of British prerogative, and assumes to exercise this extra-territorial authority, to the manifest injury and annoyance of the citizens and subjects of other states, on board their own vessels, on the high seas.

Every merchant-vessel on the seas is rightfully considered as part of the territory of the country to which it belongs. The entry, therefore, into such vessel, being neutral, by a belligerent, is an act of force, and is, *prima facie*, a wrong, a trespass, which can be justified only when done for some purpose allowed to form a sufficient justification by the law of nations. But a British cruiser enters an American merchant-vessel in order to take therefrom supposed British subjects; offering no justification, therefore, under the law of nations, but claiming the right under the law of England respecting the king's prerogative. This cannot be defended. English soil, English territory, English jurisdiction, is the appropriate sphere for the operation of English law. The ocean is the sphere of the law of nations; and any merchant-vessel on the seas is by that law under the protection of the laws of her own nation, and may claim immunity, unless in cases in which that law allows her to be entered or visited.

If this notion of perpetual allegiance, and the consequent power of the prerogative, was the law of the world; if it formed part of the conventional code of nations, and was usually practised, like the right of visiting neutral ships, for the purpose of discovering and seizing enemy's property, then impressment might be defended as a common right, and there would be no remedy for the evil till the national code should be altered. But this is by no means the case. There is no such principle incorporated into the code of nations. The doctrine stands only as English law, not as a national law; and English law cannot be of force beyond English dominion. Whatever duties or relations that law creates between the sovereign and his subjects can be enforced and maintained only within the realm, or proper possessions or territory of the sovereign. There may be quite as just a prerogative right to the property of subjects as to their personal services, in an exigency of the state; but no government thinks of controlling by its own laws property of its subjects situated abroad; much less does any government think of entering the territory of another power for the purpose of seizing such property and applying it to its own uses. As laws, the prerogatives of the crown of England have no obligation on persons or property domiciled or situated abroad.

"When, therefore," says an authority not unknown or un-

regarded on either side of the Atlantic, "we speak of the right of a state to bind its own native subjects everywhere, we speak only of its own claim and exercise of sovereignty over them when they return within its own territorial jurisdiction, and not of its right to compel or require obedience to such laws, on the part of other nations, within their own territorial sovereignty. On the contrary, every nation has an exclusive right to regulate persons and things within its own territory, according to its sovereign will and public polity."

The good sense of these principles, their remarkable pertinency to the subject now under consideration, and the extraordinary consequences resulting from the British doctrine, are signally manifested by that which we see taking place every day. England acknowledges herself overburdened with population of the poorer classes. Every instance of the emigration of persons of those classes is regarded by her as a benefit. England, therefore, encourages emigration; means are notoriously supplied to emigrants, to assist their conveyance, from public funds; and the New World, and most especially these United States, receive the many thousands of her subjects thus ejected from the bosom of their native land by the necessities of their condition. They come away from poverty and distress in over-crowded cities, to seek employment, comfort, and new homes in a country of free institutions, possessed by a kindred race, speaking their own language, and having laws and usages in many respects like those to which they have been accustomed; and a country which, upon the whole, is found to possess more attractions for persons of their character and condition than any other on the face of the globe. It is stated that, in the quarter of the year ending with June last, more than twenty-six thousand emigrants left the single port of Liverpool for the United States, being four or five times as many as left the same port within the same period for the British colonies and all other parts of the world. Of these crowds of emigrants, many arrive in our cities in circumstances of great destitution, and the charities of the country, both public and private, are severely taxed to relieve their immediate wants. In time they mingle with the new community in which they find themselves, and seek means of living. Some find employment in the cities, others go to the frontiers, to cultivate lands reclaimed from the forest; and a greater or less

number of the residue, becoming in time naturalized citizens, enter into the merchant service under the flag of their adopted country.

Now, my Lord, if war should break out between England and a European power, can any thing be more unjust, any thing more irreconcilable to the general sentiments of mankind, than that England should seek out these persons, thus encouraged by her and compelled by their own condition to leave their native homes, tear them away from their new employments, their new political relations, and their domestic connections, and force them to undergo the dangers and hardships of military service for a country which has thus ceased to be their own country? Certainly, certainly, my Lord, there can be but one answer to this question. Is it not far more reasonable that England should either prevent such emigration of her subjects, or that, if she encourage and promote it, she should leave them, not to the embroilment of a double and contradictory allegiance, but to their own voluntary choice, to form such relations, political or social, as they see fit in the country where they are to find their bread, and to the laws and institutions of which they are to look for defence and protection?

A question of such serious importance ought now to be put at rest. If the United States give shelter and protection to those whom the policy of England annually casts upon their shores; if, by the benign influences of their government and institutions, and by the happy condition of the country, those emigrants become raised from poverty to comfort, finding it easy even to become land-holders, and being allowed to partake in the enjoyment of all civil rights; if all this may be done, (and all this is done, under the countenance and encouragement of England herself,) is it not high time that, yielding that which had its origin in feudal ideas as inconsistent with the present state of society, and especially with the intercourse and relations subsisting between the Old World and the New, England should at length formally disclaim all right to the services of such persons, and renounce all control over their conduct?

But impressment is subject to objections of a much wider range. If it could be justified in its application to those who are declared to be its only objects, it still remains true that, in

its exercise, it touches the political rights of other governments, and endangers the security of their own native subjects and citizens. The sovereignty of the state is concerned in maintaining its exclusive jurisdiction and possession over its merchant-ships on the seas, except so far as the law of nations justifies intrusion upon that possession for special purposes; and all experience has shown, that no member of a crew, wherever born, is safe against impressment when a ship is visited.

The evils and injuries resulting from the actual practice can hardly be overstated, and have ever proved themselves to be such as should lead to its relinquishment, even if it were founded in any defensible principle. The difficulty of discriminating between English subjects and American citizens has always been found to be great, even when an honest purpose of discrimination has existed. But the lieutenant of a man-of-war, having necessity for men, is apt to be a summary judge, and his decisions will be quite as significant of his own wants and his own power as of the truth and justice of the case. An extract from a letter of Mr. King, of the 13th of April, 1797, to the American Secretary of State, shows something of the enormous extent of these wrongful seizures.

"Instead of a few, and these in many instances equivocal cases, I have," says he, "since the month of July past, made application for the discharge from British men-of-war of two hundred and seventy-one seamen, who, stating themselves to be Americans, have claimed my interference. Of this number, eighty-six have been ordered by the Admiralty to be discharged, thirty-seven more have been detained as British subjects or as American volunteers, or for want of proof that they are Americans, and to my applications for the discharge of the remaining one hundred and forty-eight I have received no answer; the ships on board of which these seamen were detained having, in many instances, sailed before an examination was made in consequence of my application.

"It is certain that some of those who have applied to me are not American citizens, but the exceptions are, in my opinion, few, and the evidence, exclusive of certificates, has been such as, in most cases, to satisfy me that the applicants were real Americans, who have been forced into the British service, and who with singular constancy, have generally persevered in re-

fusing pay or bounty, though in some instances they have been in service more than two years."

But the injuries of impressment are by no means confined to its immediate subjects, or the individuals on whom it is practised. Vessels suffer from the weakening of their crews, and voyages are often delayed, and not unfrequently broken up, by subtraction from the number of necessary hands by impressment. And what is of still greater and more general moment, the fear of impressment has been found to create great difficulty in obtaining sailors for the American merchant service in times of European war. Seafaring men, otherwise inclined to enter into that service, are, as experience has shown, deterred by the fear of finding themselves ere long in compulsory military service in British ships of war. Many instances have occurred, fully established by proof, in which raw seamen, natives of the United States, fresh from the fields of agriculture, entering for the first time on shipboard, have been impressed before they made the land, placed on the decks of British men-of-war, and compelled to serve for years before they could obtain their release, or revisit their country and their homes. Such instances become known, and their effect in discouraging young men from engaging in the merchant service of their country can neither be doubted nor wondered at. More than all, my Lord, the practice of impressment, whenever it has existed, has produced, not conciliation and good feeling, but resentment, exasperation, and animosity between the two great commercial countries of the world.

In the calm and quiet which have succeeded the late war, a condition so favorable for dispassionate consideration, England herself has evidently seen the harshness of impressment, even when exercised on seamen in her own merchant service, and she has adopted measures calculated, if not to renounce the power or to abolish the practice, yet at least to supersede its necessity by other means of manning the royal navy more compatible with justice and the rights of individuals, and far more conformable to the spirit and sentiments of the age.

Under these circumstances, the government of the United States has used the occasion of your Lordship's pacific mission to review this whole subject, and to bring it to your notice and that of your government. It has reflected on the past, pondered

the condition of the present, and endeavored to anticipate, so far as might be in its power, the probable future; and I am now to communicate to your Lordship the result of these deliberations.

The American government, then, is prepared to say that he practice of impressing seamen from American vessels cannot hereafter be allowed to take place. That practice is founded on principles which it does not recognize, and is invariably attended by consequences so unjust, so injurious, and of such formidable magnitude, as cannot be submitted to.

In the early disputes between the two governments on this so long contested topic, the distinguished person to whose hands were first intrusted the seals of this department* declared, that "the simplest rule will be, that the vessel being American shall be evidence that the seamen on board are such."

Fifty years' experience, the utter failure of many negotiations, and a careful reconsideration, now had, of the whole subject, at a moment when the passions are laid, and no present interest or emergency exists to bias the judgment, have fully convinced this government that this is not only the simplest and best, but the only rule, which can be adopted and observed, consistently with the rights and honor of the United States and the security of their citizens. That rule announces, therefore, what will hereafter be the principle maintained by their government. In every regularly-documented American merchant-vessel the crew who navigate it will find their protection in the flag which is over them.

This announcement is not made, my Lord, to revive useless recollections of the past, nor to stir the embers from fires which have been, in a great degree, smothered by many years of peace. Far otherwise. Its purpose is to extinguish those fires effectually, before new incidents arise to fan them into flame. The communication is in the spirit of peace, and for the sake of peace, and springs from a deep and conscientious conviction that high interests of both nations require this so long contested and controverted subject now to be finally put to rest. I persuade myself that you will do justice to this frank and sincere avowal of motives, and that you will communicate your sentiments in this respect to your government.

* Mr. Jefferson.

This letter closes, my Lord, on my part, our official correspondence; and I gladly use the occasion to offer you the assurance of my high and sincere regard.

DANIEL WEBSTER.

LORD ASHBURTON, &c., &c., &c.

Lord Ashburton to Mr. Webster.

Washington, August 9, 1842.

SIR, — The note you did me the honor of addressing me the 8th instant, on the subject of impressment, shall be transmitted without delay to my government, and will, you may be assured, receive from them the deliberate attention which its importance deserves.

The object of my mission was mainly the settlement of existing subjects of difference; and no differences have or could have arisen of late years with respect to impressment, because the practice has, since the peace, wholly ceased, and cannot, consistently with existing laws and regulations for manning her Majesty's navy, be, under the present circumstances, renewed.

Desirous, however, of looking far forward into futurity to anticipate even possible causes of disagreement, and sensible of the anxiety of the American people on this grave subject of past irritation, I should be sorry in any way to discourage the attempt at some settlement of it; and, although without authority to enter upon it here during the limited continuance of my mission, I entertain a confident hope that this task may be accomplished, when undertaken with the spirit of candor and conciliation which has marked all our late negotiations.

It not being our intention to endeavor now to come to any agreement on this subject, I may be permitted to abstain from noticing at length your very ingenious arguments relating to it, and from discussing the graver matters of constitutional and international law growing out of them. These sufficiently show that the question is one requiring calm consideration; though I must, at the same time, admit that they prove a strong necessity of some settlement for the preservation of that good understanding which, I trust, we may flatter ourselves that our joint labors have now succeeded in establishing

I am well aware that the laws of our two countries maintain opposite principles respecting allegiance to the sovereign.

America, receiving every year by thousands the emigrants of Europe, maintains the doctrine suitable to her condition, of the right of transferring allegiance at will. The laws of Great Britain have maintained from all time the opposite doctrine. The duties of allegiance are held to be indefeasible; and it is believed that this doctrine, under various modifications, prevails in most, if not in all, the civilized states of Europe.

Emigration, the modern mode by which the population of the world peaceably finds its level, is for the benefit of all, and eminently for the benefit of humanity The fertile deserts of America are gradually advancing to the highest state of cultivation and production, while the emigrant acquires comfort which his own confined home could not afford him.

If there were any thing in our laws or our practice on either side tending to impede this march of providential humanity, we could not be too eager to provide a remedy; but as this does not appear to be the case, we may safely leave this part of the subject without indulging in abstract speculations having no material practical application to matters in discussion between us.

But it must be admitted that a serious practical question does arise, or, rather, has existed, from practices formerly attending the mode of manning the British navy in times of war. The principle is, that all subjects of the crown are, in case of necessity, bound to serve their country, and the seafaring man is naturally taken for the naval service. This is not, as is sometimes supposed, any arbitrary principle of monarchical government, but one founded on the natural duty of every man to defend the life of his country; and all the analogy of your laws would lead to the conclusion, that the same principle would hold good in the United States if their geographical position did not make its application unnecessary.

The very anomalous condition of the two countries with relation to each other here creates a serious difficulty. Our people are not distinguishable; and, owing to the peculiar habits of sailors, our vessels are very generally manned from a common stock. It is difficult, under these circumstances, to execute laws which at times have been thought to be essential for the existence of the country, without risk of injury to others. The extent and importance of those injuries, however, are so formida-

ble, that it is admitted that some remedy should, if possible, be applied; at all events, it must be fairly and honestly attempted. It is true, that during the continuance of peace no practical grievance can arise; but it is also true, that it is for that reason the proper season for the calm and deliberate consideration of an important subject. I have much reason to hope that a satisfactory arrangement respecting it may be made, so as to set at rest all apprehension and anxiety; and I will only further repeat the assurance of the sincere disposition of my government favorably to consider all matters having for their object the promoting and maintaining undisturbed kind and friendly feelings with the United States.

I beg, Sir, on this occasion of closing the correspondence with you connected with my mission, to express the satisfaction I feel at its successful termination, and to assure you of my high consideration and personal esteem and regard.

ASHBURTON.

HON. DANIEL WEBSTER, &c., &c., &c.

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